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Supreme Court, U.S.
FILED

No. 10-484 OCT 8 - 2010

OFFICE OF THE CLERK

In The

Supreme Court of the United States

BRANT SITZES, INDIVIDUALLY, et al.,

Petitioners,

v.

CITY OF WEST MEMPHIS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a government actor's professed belief as to the existence of an emergency situation trumps all other evidence as a matter of law for the purpose of invoking the intent-to-harm standard to determine if his actions violate the substantive due process clause of the Fourteenth Amendment.

2. Whether the lower court erred by expanding the degree of recklessness upheld under the intent-to-harm standard when applied to police driving, which results in the serious injury or death of citizens, particularly in response to a non-emergency, routine police call when the driving is alleged to be so grossly reckless as to exceed all prior cases upheld by the various circuits.

PARTIES TO THE PROCEEDING

BRANT SITZES, individually & as Joint Administrator of Estate of Brittney Rae Sitzes, Deceased; & as Parent and Next Friend of Shelby L. Sitzes, a Minor; NANCY SITZES, Individually & as Joint Administrator of Estate of Brittney Rae Sitzes, Deceased; & as Parent and Next Friend of Shelby L. Sitzes, a Minor, Petitioners

CITY OF WEST MEMPHIS, ARKANSAS; WILLIAM H. JOHNSON, Individually & in Official Capacity as Mayor of West Memphis, Arkansas; ROBERT PAUDERT, Individually & in Official Capacity as Chief of Police, West Memphis, Arkansas; JAMES WRIGHT, Individually & in Official Capacity as Police Officer, West Memphis, Arkansas; ARKANSAS MUNICIPAL LEAGUE; WEST MEMPHIS CITY COUNCIL, Respondents

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OPINIONS BELOW

The divided opinion of the United States Court of Appeals for the Eighth Circuit is reported at 606 F.3d 461 (8th Cir. 2010) and is reprinted in the Appendix to the Petition ("App.") at App. 1. The opinion of the United States District Court for the Eastern District of Arkansas is an unreported decision and is reprinted at App. 45. The Court of Appeals' denial of the Sitzes' timely Petition for Rehearing and Rehearing *en banc* is unreported and is reprinted at App. 57.

JURISDICTION

The decision of the United States Court of Appeals for the Eighth Circuit, affirming the District Court's Order Granting Summary Judgment, was handed down on June 4, 2010. The denial of the Petition for Rehearing was handed down on July 15, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment 14, § 1:

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. Factual Background

On February 21, 2007, Brittney Sitzes, almost 17, was driving her father's car, and her younger sister, Shelby Sitzes, was a passenger. Brittney and Shelby were heading to their mother's house between 3:30 and 4:00 p.m. Brittney and Shelby were traveling North on Rich Road in West Memphis, Arkansas, approaching the intersection of Arlington Street. Rich Road is a two lane roadway, with one lane designated for northbound traffic and one lane designated for southbound traffic. Arlington Street runs perpendicular to Rich Road, and traffic is controlled by a stop sign at its intersection with Rich Road. The traffic on Rich Road has no traffic signs that govern traffic at the intersection with Arlington Street.

On February 21, 2007, Officer James Wright had returned for his first day of duty with the West Memphis Police Department since February 14, 2007. Officer Wright had been on medical leave for the previous seven days as a result of injuries he sustained in a separate car collision between a private citizen and himself. This collision also alleged

high-speed driving not in response to an emergency and resulted in serious injuries to the struck motorist, and it occurred approximately one hour after Police Chief Robert Paudert had informed Officer Wright that his employment status as an officer was under advisement pending an investigation of photographs Officer Wright had posted of himself in uniform pointing his gun at the camera on a social networking site. Officer Wright was on patrol between 3:30 and 4:30 p.m. on Wednesday, February 21, 2007, when he heard the dispatched call concerning an incident at Wal-Mart involving two suspects who were posing as security guards and a later transmission which advised they had left the scene after a theft and possible assault. The Wal-Mart area was located in Officer Wright's assigned ward for that day, and he was proceeding to Wal-Mart to take the report from the theft victims. Officer Charles McDougal and another officer were closer to the vicinity and were also responding to the call.

In route to Wal-Mart, Officer Wright traveled North on Rich Road. Officer Wright was traveling between 80 to 90 miles per hour along Rich Road, which has a posted speed limit of 30 miles per hour. Rich Road runs through a residential neighborhood, and several schools are located within walking distance. It is disputed whether Officer Wright had activated his emergency lights and sirens. It is, however, undisputed that Officer Wright heard over the radio, *before* accelerating his vehicle to speeds of approximately 90 miles per hour, that the suspects of

the alleged assault had left the scene, the victims were safe, and that Officers McDougal and Tatum were already in route to the scene and would arrive to the scene before him. As he approached the intersection of Rich Road and Arlington Street, Officer Wright was still traveling between 80 to 90 miles per hour. Petitioners submitted the sworn testimony of four eye-witnesses who stated that Officer Wright did not have his lights and sirens on as he proceeded down Rich Road, and for the purposes of summary judgment, the District Court and the Eighth Circuit construed this disputed fact as being true. There were at least two cars situated between the Sitzes' vehicle and Wright's vehicle on the roadway, with all cars heading north. Brittney, after slowing or coming to a complete stop at and visually clearing the intersection, began to make a left-hand turn on Arlington Street. Officer Wright traveled north into the oncoming southbound lane of traffic on Rich Road as he approached the Arlington Street intersection to pass at least two cars traveling in the northbound lane of traffic and was attempting to pass a third, which was the Sitzes' vehicle, when Officer Wright struck the driver's side of Brittney Sitzes's vehicle head on with the front of his vehicle with such force that the vehicle and its passengers traveled approximately 142 feet from impact on Rich Road coming to rest impaled upon a tree in the yard of a resident on Rich Road. Officer Wright's vehicle traveled an additional 84 feet further North across the street on the East side of Rich Road. App. 80-82 (photos).

Brittney Sitzes sustained fatal injuries as a result of the collision, and her minor sister, Shelby, sustained severe permanent injuries.

II. Procedural History

In the current case, Brant Sitzes and Nancy Sitzes filed a lawsuit against the Respondents on behalf of themselves, the estate of their deceased minor daughter Brittney Sitzes and their injured minor daughter, Shelby Sitzes, pursuant to 42 U.S.C. § 1983, alleging violations of the Fourteenth Amendment arising from the grossly reckless driving of Respondent James Wright while responding to a non-emergency, routine police call.

Respondents filed separate Motions for Summary Judgment, arguing that Officer Wright's conduct must be analyzed under the intent-to-harm standard because Officer Wright subjectively believed he was responding to an emergency call. Respondents asserted that Petitioners could not establish that Officer Wright intended to harm Brittney and Shelby Sitzes; thus, they were entitled to summary judgment.

The District Court applied the intent-to-harm standard and found no constitutional violation in Wright's conduct, and it did not reach the claims of municipal liability for failure to train and supervise. The District Court also declined, without prejudice, pendant jurisdiction over Plaintiffs' state law claims.

Brant Sitzes and Nancy Sitzes appealed to the Eighth Circuit Court of Appeals asserting that the District Court incorrectly applied the intent-to-harm standard to this case because Officer Wright was not pursuing a fleeing suspect or responding to an emergency and that his driving was even beyond the degree of recklessness previously upheld in actual emergency situations.

REASONS FOR GRANTING THE PETITION

I. The Eighth Circuit decision is in direct conflict with established Supreme Court precedent and with the Circuit Courts of Appeals regarding which evidence should be examined to determine whether the intent-to-harm standard applies to a government actor's conduct.

The Eighth Circuit decision created a novel approach which effectively allows a government actor to determine his own level of culpability under the Fourteenth Amendment with only a professed belief concerning the existence of an emergency situation. The Eighth Circuit can cite no authority other than its own decision in *Terrell v. Larson*, 396 F.3d 975 (8th Cir. 2005), to support this standard and has imposed a burden of proof so high that it cannot be met with any kind of evidence. The Eighth Circuit's approach refuses to consider any evidence other than an individual officer's alleged belief that an emergency existed when determining whether the circumstances

warrant application of the intent-to-harm standard. App. 11-12. This approach does not conform to the Supreme Court's opinion in *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708 (1998), and is in disagreement with the approach of the Circuit Courts of Appeals with respect to pursuit and non-pursuit cases as well as other substantive due process claims.

The standard set forth by the Eighth Circuit in this case prohibits courts from undergoing an analysis of the facts in a case, save one: the professed subjective belief concerning the existence of an emergency of the individual officer or officers whose conduct is in question. App. 12. In explaining its reasoning for affirming the District Court and applying the intent-to-harm standard, the Eighth Circuit stated the following:

> Because "substantive due process liability . . . turns on the government official's evil intent," we rejected the district court's objective consideration of what constituted an emergency and "conclude[d] that [the] issue turns on whether the deputies subjectively believed that they were responding to an emergency. App. 10 (citing *Terrell v. Larson*, 396 F.3d, at 980).

In *Lewis*, the Court acknowledged that culpability under substantive due process ran along a spectrum, at which one end existed conduct intended to harm an individual that would most likely be conscience shocking and at the other existed conduct which is negligent in the traditional tort sense and would

never rise to a conscience-shocking level. Along this spectrum exists a middle-range of culpability which is more than traditional negligence but less that intentional harm. This measure of culpability is often recklessness or gross negligence. *Id.*, at 849, 118 S.Ct., at 1718. Violations of due process may exist at this mid-level of culpability, but such instances are matters "for closer calls." *Id.* Determining the standard of culpability requires an exact analysis of circumstances because the "[r]ules of due process are not . . . subject to mechanical application in unfamiliar territory." *Id.*, at 850, 118 S.Ct., at 1718. The Supreme Court emphasized that a bright line rule of which conduct may violate substantive due process and which conduct may not is not a workable standard in this area of the law. Violations of due process involve a concept whose "application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case." *Id.*, at 850, 118 S.Ct., 1719 (quoting *Betts v. Brady*, 316 U.S. 455, 462, 62 S.Ct. 1252, 1256 (1942)).

A. Supreme Court precedent demands an exact analysis of the facts of the situation when determining whether a government actor has violated an individual's substantive due process rights.

In *County of Sacramento v. Lewis*, the Supreme Court enunciated the appropriate standard of culpability a government official must have to violate an

individual's constitutional rights as conduct that "shocks the contemporary conscience." *County of Sacramento v. Lewis*, 523 U.S., at 847, n. 8, 118 S.Ct., at 1717. The Supreme Court specifically emphasized that "'the touchstone of due process is the protection of the individual against arbitrary action of government.'" *Id.*, at 845, 118 S.Ct., at 1716 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 2976 (1974)). The decision of the Eighth Circuit is directly contrary to this Court's holding and reasoning in *Lewis*.

The *Lewis* opinion only addressed the reasons why the intent-to-harm standard should be applied to high-speed police chases and to an officer's decision to begin and continue a high-speed police chase aimed at apprehending a suspect offender. *Lewis*, 523 U.S., at 853-854, 118 S.Ct., at 1720. Although many of the same concerns that compel a higher standard in police chases are also present when an officer is responding to an emergency situation, those concerns are not present if an officer is not responding to an actual emergency. For this reason, it is critical under the reasoning of *Lewis* to first determine the nature of the situation that requires a response so that an officer can make a decision about the manner in which he should respond. It is also important to consider situations in which an officer is presented with circumstances that could lead to an inference that his alleged subjective belief regarding the nature of the situation was professed in bad faith in an attempt to avoid accountability. Specifically, the

majority said that while Officer Wright's alleged belief that the situation at Wal-Mart was an emergency was unreasonable, but "for the language in *Terrell*, this unreasonableness might be enough to remove this case from the intent-to-harm realm of cases." App. 15. The Eighth Circuit held in *Terrell* that "whether Larson and Longen could reasonably have decided that they were not needed as additional back-up is irrelevant. Under *Lewis*, the intent-to-harm culpability standard applies if they believed they were responding to an emergency call." *Terrell v. Larson*, 396 F.3d, at 980. Justice Kennedy, however, regarding the shocks-the-conscience standard, stated in his concurring opinion in *Lewis* the following:

> The phrase has the unfortunate connotation of a standard laden with subjective assessments. In that respect, it must be viewed with considerable skepticism. As our opinion in *Collins v. Harker Heights* illustrates, however, the test can be used to mark the beginning point in asking whether or not the *objective character* of certain conduct is consistent with our traditions, precedents, and historical understanding of the Constitution and its meaning. *Lewis*, 523 U.S., at 857, 118 S.Ct., at 1722 (Kennedy, J., concurring) (citing *Collins v. Harker Heights*, 503 U.S. 115, 126-128, 112 S.Ct. 1061, 1069-1070 (1992)) (emphasis added).

The statement by the Eighth Circuit in *Terrell* appears to hold the exact opposite of the holding in *Lewis*. Further, the opinion in *Lewis* did not base the

application of the intent-to-harm standard on the subjective belief of the officers regarding the need to apprehend a fleeing suspect. The Eighth Circuit approach relies solely on the subjective belief of the government actor regarding the existence of the emergency but refuses to consider the circumstances of the alleged emergency. App. 12.

In the instance of a high-speed police chase aimed at apprehending a fleeing suspect, the very circumstances that cause the high-speed chase (i.e. a fleeing offender) happen in the presence of at least one officer; thus, the need to take flight in order to apprehend the fleeing suspect is readily apparent to the officer. In this situation, the officer automatically knows he needs to give chase and must balance that need against the risk that the chase presents to other drivers and bystanders. *Lewis*, 523 U.S., at 855, 118 S.Ct., at 1721. In these situations, where the need for split-second judgment is all but obvious, the Supreme Court still considers evidence of the circumstances surrounding the decision to begin the high-speed chase, including but not limited to the department policies for pursuits, the nature of the offense for which the suspects were being chased, etc. See *Lewis*, 523 U.S., at 855, 118 S.Ct., at 1721 (noting that the government actor had done nothing to encourage or cause the lawless actions of the occupants of the motorcycle but had only witnessed it occur).

In *Whitley v. Albers*, the Supreme Court stated, concerning the factors relevant to determining the

standard under which to analyze a prison official's conduct, as follows:

> As the District Court correctly perceived "such factors as the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted," are relevant to that ultimate determination . . . But equally relevant are such factors as the extent of the threat to the safety of the staff and inmates, as *reasonably* perceived by the responsible officials on the basis of the *facts known to them*, and any efforts made to temper the severity of a forceful response. *Whitley v. Albers*, 475 U.S. 312, 321, 106 S.Ct. 1078, 1085 (1986) (citing *Johnson v. Glick*, 481 F.2d 1028, 1033 (2nd Cir.) (Friendly, J.), *cert. denied sub nom John v. Johnson*, 414 U.S. 1033, 94 S.Ct. 462 (1973)) (emphasis added).

The Supreme Court directly stated that the competing interests at stake when a government official decides to act must be viewed as the government official reasonably perceived them based on the facts known to him. The Eighth Circuit standard of subjective belief of the government official being the only relevant factor to be considered when determining whether to apply the intent-to-harm standard is in direct contradiction not just with established Supreme Court precedent but with the very precedent in which the Supreme Court established the intent-to-harm standard. The Supreme Court requires that facts known to the government actors and the facts

upon which they based their decision to act must be reviewed and are certainly relevant. The Eighth Circuit refuses to consider these facts, twice referring to its concern that considering objective evidence will lead to an inappropriate "fact-intensive, hindsight-oriented approach." App. 12 (citing *Helseth v. Burch*, 258 F.3d 867, 871 n. 2 (8th Cir. 2001)). However, a fact-intensive approach is exactly what the Supreme Court requires. *Whitley v. Albers*, 475 U.S., at 321, 106 S.Ct., at 1085. *Cf. Lewis*, 523 U.S., at 850, 118 S.Ct., at 1719. It is noteworthy in this case that the actual radio transmissions are contained in the record so that the court is able to hear the exact dispatches heard by Officer Wright concerning the call to which he was responding.

B. The Eighth Circuit decision is in conflict with the approach taken by the Third, Sixth, Ninth, and Tenth Circuits.

The Circuit Courts of Appeals also consider the facts as presented to the government actor when deciding whether to apply the intent-to-harm standard to a high-speed chase aimed at apprehending a fleeing suspect. See *Wilkinson v. Torres*, 610 F.3d 546, 554-555 (9th Cir. 2010) (noting that the government actors were attempting to take occupants of the stolen vehicle in custody when the driver began revving the engine in reverse and attempting to back the vehicle over other officers thus placing their lives in danger); and *Jones v. Byrnes*, 585 F.3d 971, 977-978 (6th Cir. 2009) (analyzing the government actors'

decision to continue a high-speed chase during the pre-dawn hours of armed robbery suspects who had extinguished the vehicles' headlights in an attempt to evade officers in light of potential departmental violations as well as the danger the suspects posed to the public by driving without headlights).

Further, the Circuits that have expanded the holding in *Lewis* to apply to situations in which an officer is responding to an emergency situation also do not rely only on the government actor's stated subjective belief as to the existence of an emergency as the reason for applying the intent-to-harm standard. These Circuits consider a variety of evidence about the situation to determine whether its nature and circumstances present the same competing obligations which require a decision to be made without the time to deliberate and under pressure.

In *Green v. Post*, a motorist was killed when a police officer sped through a yellow light at an intersection while he was attempting to catch up to a vehicle suspected of stealing gas from a station. The motorist was attempting to turn left in the intersection when he was struck by the officer's car. The Tenth Circuit considered the nature of the call to which the officer was responding noting that it required a rapid response and considered that the evidence showed the officer did not have his lights or sirens on as he entered the intersection. They also considered the report of the accident reconstruction expert and the dashboard camera. *Green v. Post*, 574 F.3d 1294, 1303-1304, n. 9 (10th Cir. 2009). Regarding

its analysis of the officer's actions the court stated "we do not attempt to set out any bright-line rules regarding all police conduct. Given the Supreme Court's directive that we examine the particular circumstances of the case before deciding whether our consciences are shocked, such bright-line rules are difficult, if not impossible to draw." *Id.*, at 1304.

In *Porter v. Osborn*, the Ninth Circuit remanded the case to the District Court to examine the evidence to determine "whether under the totality of the circumstances a jury could infer that Osborn was acting for purposes other than legitimate law enforcement." *Porter v. Osborn*, 546 F.3d 1131, 1141 (9th Cir. 2008). The Ninth Circuit went on to identify the particular types of evidence that should be considered by the District Court, which includes the nature of the reason for initial investigation and whether it posed a threat to officer safety, whether the officers involved in the incident (not just the officer whose actions are in question) felt they were in danger, and whether the officers were in compliance with the state's regulations governing their situation. *Id.*, at 1142.

The Ninth Circuit has also held that while the intent of the government actor is certainly relevant, it was not central to the Supreme Court's method for determining which standard of culpability to apply under the Fourteenth Amendment. The critical question is whether the government official had actual time to deliberate and "in deciding the level of culpability to apply under the shocks the conscience

test [the Ninth Circuit] has declined to parse an officer's intentions and initial decisions." *Porter v. Osborn*, 546 F.3d, at 1138 (citing *Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 372 (9th Cir. 1998) (addressing officer conduct only after determining the standard of culpability by reference to situation the officers faced)).

The Sixth Circuit has held that whether conduct that falls within the middle-range of culpability violates the Fourteenth Amendment is based upon the facts and circumstances of that particular case. Thus, it is critical to undertake an examination of the facts and circumstances prior to determining which standard of culpability applies to the government actor's conduct. *Ewolski v. City of Brunswick*, 287 F.3d 492, 510 (6th Cir. 2002). In *Ewolski*, the Sixth Circuit held that the police department's decision for tactical maneuvering during a two-day standoff with a mentally ill husband holding his invalid wife and minor child hostage was subject to the standard of deliberate indifference. After reviewing all the circumstances surrounding the stand-off, the Sixth Circuit determined that although the officers were clearly involved in a tense, high-pressure situation and were faced with balancing competing obligations, the situation was one where actual deliberation about the decisions to be made by the government actors was practical. *Id.*, at 510.

Likewise, the Third Circuit also has recognized that some situations are not necessarily hyper-pressurized situations that require a split-second

reaction but still may require a government actor to proceed without the luxury of actual deliberation. As such, "the circumstances of each case are critical. *Miller v. City of Philadelphia*, 174 F.3d 368, 375 (3rd Cir. 1999).

C. The approach created by the Eighth Circuit ignores the standard set forth by the Supreme Court in *Whitley v. Albers* and *County of Sacramento v. Lewis* and the approach followed by a number of Circuit Courts of Appeals.

The majority opinion of the Eighth Circuit refuses to remove Officer Wright's conduct from the intent-to-harm standard because the District Court found that Officer Wright subjectively believed he was responding to an emergency situation based *solely* upon a self-serving affidavit of Officer Wright filed as an exhibit to the Motion for Summary Judgment. The District Court incorrectly relied upon this as a stipulation by the parties. App. 21. Interestingly, Officer Wright was the only person who stated he believed the situation to be an emergency. The Respondents were unable to produce any witness, expert or lay, to testify that this situation was an emergency or could even be perceived as an emergency. The lower courts refused to consider the mounds of evidence presented by Petitioners to contradict Officer Wright's assertion that he believed the situation to be an emergency because Eighth Circuit precedent holds that such evidence "bears little relevance to the question of

what Officer Wright subjectively believed" and *Terrell* "forecloses inquiry into the objective nature of the emergency." App. 12. The District Court and the Eighth Circuit also disregarded highly persuasive authority in the form of Arkansas state law, in which the testimony of an interested party is deemed controverted as a matter of law. See *Barger v. Farrell*, 289 Ark. 252, 711 S.W.2d 773 (1986); *United States v. 1,674.34 Acres of Land, More or Less, in Benton County, Arkansas*, 220 F.Supp. 893 (W.D. Ark. 1963). This is not a rule of evidence but a rule of law. The reasoning behind this rule is not only persuasive but is an excellent illustration of why relying solely on the asserted subjective belief of the party government actor without considering the real-time facts should not be the controlling rule of law.

This rule of law expands the holdings in *Lewis* and *Whitley v. Albers* by effectively putting words in the mouth of this Court. The *Lewis* Court never addressed whether the belief of the existence of an emergency should be viewed from a subjective or objective perspective because the *Lewis* opinion never labels the facts and circumstances of that case as an "emergency." This is a creation of *Terrell*, not of *Lewis*. Further, the Supreme Court in *Lewis* never became involved in the diatribe between a categorization of objective nature versus subjective nature when determining which standard of culpability to apply under the Fourteenth Amendment.

The evidence used to determine the standard of culpability in *Lewis* and *Whitley v. Albers* is very

similar to the so-called evidence presented by the Petitioners in response to Officer Wright's self-serving affidavit. The law of the Eighth Circuit prohibits the District Courts from considering evidence of the facts and circumstances ***known to Officer Wright at the time of his actions***. See *Whitley v. Albers*, 475 U.S., at 321, 106 S.Ct., at 1085. The District Court and the Eighth Circuit had available for their review the actual transmission tapes from the dispatch calls that preceded Officer Wright's driving. It is not a situation requiring the court to second guess an officer who was advised there was an emergency which turns out otherwise. Both the lower courts had an opportunity to hear the exact dispatch calls that Officer Wright heard. Officer Wright asserted at his deposition that he still believed the accident was the fault of the deceased Brittney Sitzes for failing to yield to him, that he was not traveling too fast, and that he did nothing wrong. Even hindsight does not improve his "profoundly poor judgment" as characterized by the Eighth Circuit. App. 18, n. 8. The fact that an officer, with defective judgment, allegedly believes or is willing to affirm it was an emergency should not insulate him from liability under Substantive Due Process.

The decision of the Eighth Circuit exerts a great deal of effort to minimize this evidence presented by Petitioners, which supports their assertion that Officer Wright's self-serving subjective belief was not sincere, by categorizing this evidence as "objective" evidence of the "true" nature of the emergency.

App. 12. Facts that were actually known to Officer Wright as well as two other officers are neither subjective nor objective; they are simply facts. The Eighth Circuit rule of law is directly contrary to the Court's quote in *Lewis* from *Betts v. Brady*, that "'[a]sserted denial is to be tested by an appraisal of the totality of facts in a given case.'" *Lewis*, 523 U.S., at 850, 118 S.Ct., at 1719 (quoting *Betts v. Brady*, 316 U.S., at 462, 62 S.Ct., at 1256). The evidence presented by Appellants, which was properly examined in the dissenting opinion of the Eighth Circuit decision, is critical to an examination of the circumstances surrounding Officer Wright's conduct, which *Lewis* demands, but *Terrell* disregards. App. 22-29.

Petitioners also presented direct evidence that Officer Wright's alleged subjective belief was not true or professed in good faith in the form of multiple witnesses who claimed that Wright ***did not*** have his lights and sirens activated when responding to the call. As the dissenting judge noted in his opinion, the West Memphis Police Department Policy and Procedures manual divides police calls into three categories: routine, urgent and emergency. The manual also prescribes the required treatment of each type of call regarding the method of driving to be used and the implementation of an officer's sirens and lights. An emergency situation mandates the continuous use of the lights and sirens. App. 28, n. 13. In his deposition, Officer Wright testified that he knew the manual required he continuously use his lights and sirens in response to an emergency. If he was not traveling

with his lights and sirens activated yet he knows that lights and sirens are required to be in use during an emergency response, he did not legitimately believe the situation was an emergency. Officer Wright's judgment is particularly suspect when considered in the light of the circumstances surrounding his employment status on that date and as he could not give any opinion at all whether he was traveling more than thirty miles per hour.

Further, as correctly stated by the dissenting opinion, Officer Wright knew prior to accelerating his vehicle that Officers McDougal and Tatum were closer to the crime location and were actually responding to the call as opposed to "taking the report." Officers McDougal and Tatum heard the exact dispatch call that Officer Wright heard and were responding at normal speeds and were obeying all signs and devices governing traffic. App. 28. State Trooper Flarcell Tate, the investigating officer on the scene of Officer Wright's collision with Brittney and Shelby Sitzes, testified that he would never travel at the speeds Officer Wright was traveling and could not imagine a situation in which such speeds would ever be justified in that neighborhood. App. 28.

The Eighth Circuit did not consider any of the evidence discussed above, dismissing that evidence as irrelevant to the analysis of whether Officer Wright subjectively believed the situation was an emergency. App. 12. By relying solely on the subjective belief of the government actor, the Eighth Circuit has created an impossible threshold to reach in order to remove an

officer's conduct from the intent-to-harm standard, and the Eighth Circuit decision effectively gives an officer carte blanche authority to violate the constitutional rights of free citizens and insulate himself from any liability by alleging, in hindsight, that he thought it was an emergency. The facts of this case are exactly this situation the dissenting judges in *Terrell v. Larson* feared when they stated as follows:

> Today's decision has the effect of giving police officers unqualified immunity when they demonstrate deliberate indifference to the safety of the general public. A police officer may now kill innocent bystanders through criminally reckless driving that blatantly violates state law, police department regulations, accepted professional standards of police conduct, and the community's traditional ideas of fair play and decency so long as the officer subjectively, though unreasonably, believed an emergency existed. *Terrell v. Larson*, 396 F.3d, at 981 (dissent).

The Eighth Circuit attempts to quell the criticism of the dissenting judge in this opinion and the criticism of the dissenting judges in *Terrell v. Larson* regarding the insulation they have given to officers by holding that an officer cannot escape liability if his belief of a "perceived emergency is so preposterous as to reflect bad faith." App. 15. The question remains: if all evidence, except the officer's subjective belief, regarding the circumstances of the perceived emergency is not considered because it is "objective" evidence, how can a court determine whether a

government actor's belief is so preposterous that it is made in bad faith without examining the circumstances of the situation.

II. The Eighth Circuit decision establishes a bright line rule that systematically applies the intent-to-harm standard to all police driving in response to an official call.

A. The Supreme Court did not intend for *County of Sacramento v. Lewis* to establish a bright line rule governing the use and application of the intent-to-harm standard in substantive due process cases.

In *County of Sacramento v. Lewis*, Justice Souter, writing for the unanimous Court, goes to great lengths to develop the standard of "intent-to-harm" and explain its application to the circumstances presented in the *Lewis* case. The Supreme Court adopted a higher standard of culpability in the case of high-speed police chases aimed at apprehending a suspect for the same reasons it adopted the intent-to-harm standard for police conduct aimed at quelling an ongoing prison riot. Government officials in these situations are often required to make decisions "in haste, under pressure, and frequently without the luxury of a second chance." *County of Sacramento v. Lewis*, 523 U.S., at 853, 118 S.Ct., at 1720 (quoting *Whitley v. Albers*, 475 U.S., at 320, 106 S.Ct., at 1084). Further, government officials often must make decisions while balancing competing obligations. In

the instance of a high-speed police chase, an officer must balance "the need to stop a suspect and show that flight from the law is no way to freedom, and, . . . the high-speed threat to all those within stopping range, be they suspects, their passengers, other drivers, or bystanders." *Id.*, at 853, 118 S.Ct., at 1720. It is the presence of these competing obligations and their need to be balanced that is often the moving force behind the need to make decisions in tense, pressurized, and fast-paced situations. Such complicated decisions are rightfully entitled to more discretion when being judged by a court of law.

Prior to its decision in *Lewis*, the Supreme Court had also espoused a culpability standard of deliberate indifference to executive action. If the deliberate indifference of a government actor is sufficient to violate the Eighth Amendment, the Court held that it only naturally followed that such deliberately indifferent conduct would also violate the substantive due process rights of a pretrial detainee while awaiting trial. *Id.*, at 850, 118 S.Ct., at 1718 (citing *Barrie v. Grand County, Utah*, 119 F.3d 862, 867 (10th Cir. 1997); *Weyant v. Okst*, 101 F.3d 845, 856 (2nd Cir. 1996). The standard of deliberate indifference has also been utilized to determine whether a municipality can be liable for the conduct of its employees for a failure to train and supervise. See *Canton v. Harris*, 489 U.S. 378, 388-389, 109 S.Ct. 1197, 1204-1205 (1989).

However, the Supreme Court did not limit the standards of culpability to those of intent-to-harm

and deliberate indifference. The discussion in *Lewis* begins with the very important statement that "[w]e have emphasized time and time again '[t]he touchstone of due process is protection of the individual against arbitrary action of government . . . '" *County of Sacramento v. Lewis*, 523 U.S., at 845, 118 S.Ct., at 1716 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 2976 (1974)). Justice Souter then undertakes a thorough discussion of the history of the development of the shocks-the-conscience standard. *Id.*, at 846-849, 118 S.Ct., at 1716-1719. This discussion is necessary to emphasize that culpability under the Fourteenth Amendment exists along a spectrum, that violations of the Fourteenth Amendment can happen at various points of culpability along the spectrum including "recklessness or 'gross negligence'", and that intentional conduct aimed at harming an individual is at the farthest end of this spectrum. *Id.*, at 849, 118 S.Ct., at 1718 (quoting *Daniels v. Williams*, 474 U.S. 327, 334, n. 3, 106 S.Ct. 622, 665 (1986)). The rules of due process are not rules that should be subject to "mechanical application in unfamiliar territory," and neither are the standards of substantive due process. *Id.*, at 850, 118 S.Ct., at 1718. It is for this very reason that the Court "demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking." *Id.* This analysis should include an examination "tested by an appraisal of the totality of the facts in a given case." *Id.* (quoting *Betts v. Brady*, 316 U.S., at 462, 62 S.Ct., at 1256).

The reasoning of the Eighth Circuit decision as it applies the law set forth in *Terrell v. Larson* in this case does not conform to the exact analysis requirement set forth by the Supreme Court in *Lewis*. The majority has failed to undertake any analysis of the circumstances, in totality or otherwise, and created a bright line rule in regards to the standard applied to police driving in response to an emergency situation. The language in *Terrell* that the majority opinion relies upon states as follows:

> [T]hat the intent-to-harm standard of *Lewis* applies to an officer's decision to engage in high-speed driving in response to other types of emergencies [besides the high-speed pursuit of a fleeing suspect], and to the manner in which the police car is then driven in proceeding to the scene of the emergency. *Terrell*, 396 F.3d, at 979.

As discussed in Section 1 above, the Eighth Circuit opinion includes all police driving under the intent-to-harm standard without examining the circumstances surrounding the alleged emergency. The majority in *Terrell* was unable to cite any authority from the Supreme Court for its acknowledged expansion of the *Lewis* holding to include a generic catch-all category of "emergency" situations, and the majority in this opinion continues to fail to cite any authority, other than *Terrell*, to support the continued application of this legal standard. App. 34, n. 14. The standard applied in this case, as set out in *Terrell*, is directly contrary to the holdings in *Whitley v. Albers*

and *County of Sacramento v. Lewis* because it applies the intent-to-harm standard mechanically to all situations involving emergency driving by an officer without requiring *any* examination of the circumstances surrounding the supposed emergency. Supreme Court precedent specifically demands such an analysis. See *Whitley v. Albers*, 475 U.S., at 321, 106 S.Ct., at 1085; *County of Sacramento v. Lewis*, 523 U.S., at 850, 118 S.Ct., at 1718. The majority opinion in this case attempts to shield its opinion from criticism for failing to remove this case from the intent-to-harm standard or for failing to follow the specific demand made by the *Lewis* Court requiring such a rigid examination of the circumstances by claiming that it is bound by the standard set forth in *Terrell*. App. 15. The Eighth Circuit is bound first and foremost by the Supreme Court's holding in *Lewis*.

The reasoning given by the Supreme Court in *Lewis* for applying the intent-to-harm standard to a high-speed chase in pursuit of a fleeing suspect cannot be applied to every situation where an officer is responding to an alleged perceived emergency situation. In *Lewis*, the Court analogized a high-speed pursuit of a fleeing suspect to the situation an officer faces in the wake of a prison riot when saying, "[l]ike prison officials facing a riot, the police on an occasion calling for fast action have obligations that tend to tug against each other." *Lewis*, 523 U.S., at 853, 118 S.Ct., at 1720. These competing obligations are obligations to restore and maintain order while at the same time not aggravate the ensuing disorder

any more than necessary to accomplish the goal. *Id.* To assume that every instance when an officer might be responding to an emergency situation will contain these competing interests is far beyond what the Court imagined in *Lewis*. In fact, the *Lewis* Court did not go beyond the factual scenario of a high-speed police chase aimed at apprehending a fleeing suspect. *Id.*, at 854, 118 S.Ct., at 1720.

The Supreme Court did not shy away from acknowledging that mid-level culpability of recklessness or gross negligence can still cause injury-resulting conduct to be conscience-shocking. The Court in *Lewis* said "whether the point of conscience shocking is reached when injuries are produced with culpability falling within the middle range . . . 'such as recklessness or "gross negligence" ' is a closer call." *Lewis*, 523 U.S., at 849, 118 S.Ct., at 1718 (quoting *Daniels v. Williams*, 474 U.S., at 334, n. 3, 106 S.Ct., at 665). The cases involving a closer call are what prompted the Court to emphasize the importance of analyzing all the circumstances surrounding the conduct. *Id.*, at 850, 118 S.Ct., at 1718. The term "deliberate indifference" logically refers to situations where deliberation is practical. *Id.*, at 851, 118 S.Ct., at 1719. The intent-to-harm standard is appropriate when decisions must be made "'in haste, under pressure, and frequently without the luxury of a second chance.'" *Id.*, at 853, 118 S.Ct., at 1720 (quoting *Whitley v. Albers*, 475 U.S., at 320, 106 S.Ct., at 1084). If the majority had analyzed the circumstances as required by *Lewis*, and as the dissenting opinion

did, it would have seen why the all-encompassing rule of law of the Eighth Circuit applied in this case contradicts the *Lewis* opinion.

The specific circumstances surrounding the factual situation in *Lewis* were clearly important to the Court in its holding. This is evidenced by the continued reference only to "high-speed chase" or "high-speed pursuit." The Court never expounds on the facts to include other possible scenarios and it does not label a pursuit case as an "emergency situation." It constantly refers only to the facts of the *Lewis* case which are very limited to an actual pursuit of a fleeing suspect. Further, when applying the intent-to-harm standard to the facts of *Lewis*, the Court specifically notes that the officer's behavior, which was in question, was an instinctive response to the *suspect's* "outrageous" and "practically instantaneous" behavior. *Id.*, at 855, 118 S.Ct., at 1721. This is a very factually distinctive situation, and one that is not present in every single situation where an officer is responding to a dispatched, routine call over a radio.

B. The Circuit Courts of Appeals are divided over whether the intent-to-harm standard should be applied as a bright line rule to all police driving in response to an official call, whether an emergency or non-emergency.

Following this Court's decision in *Lewis*, the Circuits began applying and expanding the holding in

Lewis to apply the intent-to-harm standard to other situations involving police actions based upon the Supreme Court's reasoning that sometimes police officers are often presented with unforeseen circumstances that call for instant judgment in the face of competing obligations. *Id.*, at 853, 118 S.Ct., at 1720. See *Green v. Post*, 574 F.3d 1294, 1306 (10th Cir. 2009) (motorist's death caused by officer striking his vehicle as he ran a yellow light at an intersection in an attempt to catch a vehicle suspected of stealing gas is analyzed under the intent-to-harm standard); *Porter v. Osborn*, 546 F.3d 1131, 1133 (9th Cir. 2008) (suspect shot during the course of officers investigating a suspicious vehicle is analyzed under the purpose to harm standard because of the urgent nature of the situation); *Terrell v. Larson*, 396 F.3d 975, 977-980 (8th Cir. 2005) (police officers' emergency driving while responding to a domestic disturbance call examined under the intent-to-harm standard); and *Carter v. Simpson*, 328 F.3d 928, 952 (7th Cir. 2003) (apply intent-to-harm standard to all cases where officers are responding to an emergency call).

However, the Circuits are split on whether an officer's actions in response to a non-emergency situation or routine dispatch call that may not require a decision to be made "in haste, under pressure" because competing obligations are not present but may require a decision to be made without time for actual deliberation should be examined under the intent-to-harm standard. *County of Sacramento v. Lewis*, 523 U.S., at 853, 118 S.Ct., at 1720 (quoting

Whitley v. Albers, 475 U.S., at 320, 106 S.Ct., at 1084). The Third and Sixth Circuits have recognized that an officer may be faced with circumstances that require a decision to be made without the luxury of actual deliberation even though the typical competing obligations are not present. Conduct by a police officer in such a circumstance is not entitled to the higher standard of intent-to-harm but still must be more than deliberately indifferent.

These circuits have identified a mid-level culpability standard which requires a plaintiff to show that the government official "consciously disregarded, not just a substantial risk, but a great risk that serious harm" would result from their actions. *Ziccardi v. City of Philadelphia*, 288 F.3d 57 (3rd Cir. 2002). In *Ziccardi*, the plaintiff was a 24-year-old male who was rendered quadriplegic when the paramedics who responded to the scene of his injury roughly "snatched" him up off the ground without first stabilizing his neck and spinal cord. *Ziccardi*, 288 F.3d, at 59. The Third Circuit found that the paramedics who responded to the scene were not faced with the same pressurized situation as that of an officer deciding whether or not to start a high-speed chase with a fleeing offender, but the paramedics also were not in a situation that afforded them time to proceed in a deliberate fashion. The circumstances of the situation fell somewhere in between thus requiring a standard more than deliberate indifference but less than intent to harm. *Id.*, at 65. The Third Circuit relied on its previous opinion in *Miller v. City of Philadelphia*,

which was rendered just after this Court's opinion in *Lewis*, to articulate an intermediate standard of culpability. The *Miller* opinion thoroughly discussed the Supreme Court's explanation of a substantive due process claim, focusing specifically on the statements regarding the spectrum of culpability articulated in *Lewis*. *Miller v. City of Philadelphia*, 174 F.3d 368, 375 (3rd Cir.1999) (citing *Lewis*, 523 U.S., at 857, 118 S.Ct., at 1722 (Kennedy, J., concurring)).

The Sixth Circuit also recognized that circumstances can warrant a middle level of culpability where officers must make decisions in the face of competing obligations and under pressure but still have time to actually deliberate their actions. In *Ewolski v. City of Brunswick*, the Sixth Circuit held that the actions of police officers during a two day stand-off at gunpoint involving a paranoid schizophrenic, his bed-ridden wife, and 9-year-old son should be analyzed under a standard of deliberate indifference because although the officers had to make a choice how to handle the situation in the face of intense pressure and considering the safety of the wife and child, the officers still had time and took the time to consider their options prior to acting, thus placing the situation within the middle-range. *Ewolski v. City of Brunswick*, 287 F.3d 492, 511 (6th Cir. 2002).

In contrast, the Eighth and Seventh Circuits have employed a bright line rule that the intent to harm standard applies to all police driving in response to any type of emergency. See *Terrell v.*

Larson, 396 F.3d 975, 979 (8th Cir. 2005) ("For these reasons, we hold that the intent-to-harm standard of *Lewis* applies to an officer's decision to engage in high-speed driving in response to other types of emergencies, and to the manner in which the police car is then driven in proceeding to the scene of the emergency"); *Carter v. Simpson*, 328 F.3d 928, 952 (7th Cir. 2003) (the intent-to-harm standard applies in all cases where officers are responding to an emergency call).

C. This case illustrates why the intent-to-harm standard should not be applied as a bright line rule to all police driving in response to an official police call.

The facts of this case are a perfect example of why the Eighth Circuit's general categorization of circumstances and bright line rule are inappropriate for analyzing a substantive due process violation. Officer Wright was not faced with the concerns that are present during a prison riot or during a high-speed police chase as articulated by this Court. Officer Wright did not need to restore order to the situation because he admitted that he was aware that the suspects were no longer present at the scene of the incident at Wal-Mart and were being apprehended by Officers McDougal and Tatum who also responded to the scene and were closer by than Officer Wright. App. 25. Officer Wright also testified that he was not responding to an officer's specific request for back-up in apprehending the suspects because he

never heard a call for back-up. App. 26. The language used by the Court in *Lewis* referring to "split-second judgments in circumstances that are tense, uncertain, and rapidly evolving," is referring to a decision by an officer whether to begin a pursuit in response to a fleeing suspect and to the danger an officer faces once the chase has ensued and not to non-emergency, routine situations to which an officer must respond every day. *County of Sacramento v. Lewis*, 523 U.S., at 853, 118 S.Ct., at 1720 (quoting *Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 1865, 1872 (1989)). The Petitioner's police practices expert, Criminal Justice professor Dr. Geoffrey Alpert, stated in his report, which neither the District Court nor the Eighth Circuit considered, that "some emergency responses are more important than others. This matrix depends on what is known about the situation, the seriousness of the crime and the number of first responders who are at the location or in close proximity." App. 63.

The majority opinion acknowledged that Officer Wright not only had the actual time to deliberate his conduct, but that he actually did deliberate it. The majority stated that but for Officer Wright's "profoundly poor judgment," the accident would not have happened. App. 18 n. 8. "Profoundly poor judgment" is indicative of one taking actual time to think about his actions. Officer Wright's actions were not instinctive reactions to acts committed in his sight, as was the case in *Lewis* and *Helseth v. Burch*. See *Lewis*, 523 U.S., at 855, 118 S.Ct., at 1721; *Helseth*, 258 F.3d 867,

870 (8th Cir. 2001). His actions were an intentional and deliberate misuse of his vehicle. See *Lewis*, 523 U.S., at 854, n. 13, 118 S.Ct., at 1720 (citing to *Checki v. Webb*, 754 F.2d 534, 538 (5th Cir. 1986)). The Petitioners' accident reconstruction expert, Dr. Larry Williams, noted the following in his report:

> An authorized vehicle using a siren and red and/or blue lights does not automatically have the right-of-way. The right-of-way is requested by the emergency signals; however, the driver of an emergency vehicle must ascertain the path is clear prior to proceeding. In this situation, Wright did not ascertain the availability of a clear path prior to proceeding. He simply was traveling at an unsafe speed and at a speed that created hazard to the motoring public. App. 77-78.

Dr. Williams estimated that Officer Wright was traveling in the range of 80 mph at the moment of collision. App. 76. Multiple eyewitnesses to the accident testified that Officer Wright was traveling even faster and did not have any lights or sirens on, in complete contradiction to the established policies and procedures of the West Memphis Police Department. App. 28, n. 13. Officer Wright's vehicle was a considerable distance from the rear of the Sitzes' vehicle when Brittney commenced her turn. At 80 mph, Officer Wright's vehicle would have been traveling in excess of 117 feet per second. App. 77. Three seconds prior to the accident, Officer Wright was at least a football field's length (100 yards) or more behind the Sitzes' vehicle at the time Brittney commenced her

turn after visually clearing the intersection. This speed was too fast to give the Sitzes' vehicle any opportunity to respond to his approach, especially if the Sitzes' vehicle did not hear his approach because Officer Wright may not have had his lights and sirens in use. App. 77. This speed is not a speed that Officer Wright reached in a split-second reaction to instantaneous lawlessness by a suspect or by any other person. This speed was reached by a deliberate and intentional choice on the part of Officer Wright. According to Dr. Alpert, Officer Wright had no justification for showing such intentional and reckless disregard to the safety of other drivers by taking life-threatening chances with his vehicle, including passing multiple cars in the on-coming lane of traffic at an intersection at speeds in excess of 80 miles per hour. The situation at Wal-Mart was under control, and Officer Wright's presence at the scene would have been helpful but was not essential in light of the information he heard on his radio by the dispatcher. App. 66. Arriving at the scene after a crime has been committed is not as important as arriving to the scene during the commission of a crime. In either situation, police officers should not be permitted to drive with such wanton and willful disregard for safety of other motorists and pedestrians. App. 63.

Each time an officer begins a high-speed chase aimed at apprehending a fleeing suspect, the situation will have a common denominator: a fleeing suspect. The same cannot be said of each time an

officer is called to respond to an emergency, either as an initial responder or as back up. There will be no common denominator because each emergency situation will be different, and the circumstances that warrant defining a situation as an emergency will be different each time. For this reason, the Supreme Court emphasized the importance of analyzing the circumstances of each individual case before determining whether behavior by a government actor shocked the conscience. *County of Sacramento v. Lewis*, 523 U.S., at 850, 118 S.Ct., at 1708.

CONCLUSION

Petitioners understand that sometimes police officers face incredible risk in order to perform their job and often must make life and death decisions in the heat of the moment. However, this Court should be loathe to allow a rule of law to continue that gives police officers unchecked authority to put the lives of innocent citizens at risk, or worse take the lives of innocent citizens, and then escape accountability for their unjustifiable actions with a hind-sighted and unsupportable claim of emergency purporting to necessitate extreme driving that is highly disputed by the evidence presented without allowing a fact-finder the opportunity to resolve the material issues in dispute. For these reasons, Petitioners respectfully

request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 09-2090

Brant Sitzes, Individually & as Joint Administrator of Estate of Brittney Rae Sitzes, Deceased; & as Parent & Next Friend of Shelby L. Sitzes, a Minor; Nancy Sitzes, Individually, as Joint Administrator of Estate of Brittney Rae Sitzes, Deceased, & as Parent & Next Friend of Shelby L. Sitzes, a Minor.,	*	
Plaintiffs-Appellants,	*	
v.	*	Appeal from the
City of West Memphis Arkansas; William H. Johnson, Individually & in Official Capacity as Mayor of West Memphis, AR; Robert Paudert, Individually & in Official Capacity as Chief of Police, West Memphis, AR; James Wright, Individually & in Official Capacity as Police Officer in West Memphis, AR; Arkansas Municipal League; West Memphis City Council,	*	United States District Court for the Eastern District of Arkansas.
Defendants-Appellees.	*	

Submitted: January 15, 2010
Filed: June 4, 2010

Before GRUENDER and SHEPHERD, Circuit Judges, and LANGE,[1] District Judge.

SHEPHERD, Circuit Judge.

Appellants Brant and Nancy Sitzes (collectively "plaintiffs"), parents of Brittney and Shelby Sitzes, brought this action against Officer James Wright of the West Memphis, Arkansas, Police Department (WMPD), the City of West Memphis, and various city officials (collectively "defendants"). They alleged constitutional and state tort claims arising out of a traffic accident in which a patrol car driven by Officer Wright struck the car driven by Brittney Sitzes, killing Brittney and severely injuring Shelby, her passenger. The district court[2] granted summary judgment in favor of the defendants on the plaintiffs' federal claims and dismissed without prejudice their state tort claims. For the reasons stated below, we affirm.

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[1] The Honorable Roberto A. Lange, United States District Judge for the District of South Dakota, sitting by designation.

[2] The Honorable William R. Wilson, Jr., United States District Judge for the Eastern District of Arkansas.

I.

We recite the facts of this tragic case in the light most favorable to the plaintiffs, the nonmoving parties.[3] *Dovenmuehler v. St. Cloud Hosp.*, 509 F.3d 435, 437 (8th Cir. 2007). On February 21, 2007, Officer Wright was on duty as a patrolman assigned to the northwest ward of West Memphis. At approximately 4:00 p.m., a man called 911 to report that two people claiming to be Wal-Mart security officers had stolen $55 from him and his friend in the Wal-Mart parking lot. A WMPD dispatcher broadcast over the radio that there were men posing as security at Wal-Mart, and WMPD Officer Charles Mark McDougal indicated that he would respond. Officer Wright also heard this radio dispatch and stated that he would respond as well.[4] Shortly thereafter, the man called 911 again and told the dispatcher that one of the alleged robbers had assaulted him. This information was also relayed over the police radio, at which time a third

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[3] The dissent correctly notes that the district court failed to properly view some of the evidence in the light most favorable to the plaintiffs. *See infra* at 15. Since our review is de novo, this does not, by itself, constitute reversible error.

[4] Although the district court stated that Officer Wright was traveling to Wal-Mart because of a request for backup, Officer Wright testified in his deposition that it is WMPD policy for two patrol cars to respond to every call and that he decided to respond because the Wal-Mart was in his assigned ward and he felt it would be his responsibility to take the report. Officer McDougal did later make a request for backup, but only after Officer Wright's accident.

officer indicated that she was also en route to the scene.

In traveling to Wal-Mart, Officer Wright drove north on Rich Road, a residential street with a posted speed limit of 30 m.p.h. Witnesses estimated that Officer Wright was traveling at 80-90 m.p.h., well above the posted speed limit. Witnesses also stated that Officer Wright had neither his emergency lights nor his siren activated at the time, a fact that Officer Wright disputes. As he approached the intersection of Rich Road and Arlington Road, Officer Wright was traveling in the southbound (opposing) lane of traffic, attempting to pass cars traveling northbound. At the intersection of Rich and Arlington Roads there are no stop or yield signs for drivers on Rich Road, but there are stop signs for drivers on Arlington Road. Officer Wright stated in an affidavit that he believed the situation at the Wal-Mart was an emergency which required driving in this manner.[5]

Unfortunately, at the same time, Brittney Sitzes was also driving north on Rich Road ahead of Officer Wright, with her younger sister Shelby in the passenger seat. As Brittney approached the intersection with Arlington Road, she slowed and began to make a left-hand turn onto Arlington Road. As Officer Wright

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[5] Officer Wright's affidavit was filed as an exhibit to his motion for summary judgment well after Officer Wright's deposition. Plaintiffs conceded that Officer Wright made this statement but argued that the evidence did not support his belief.

entered the intersection, he struck the driver's side of Brittney's car as she executed her turn. Brittney was killed in the accident, and Shelby sustained severe injuries.

In February 2008, plaintiffs filed this action on behalf of Shelby and Brittney's estate against Officer Wright, the City of West Memphis, and several city officials. They alleged various state law and constitutional violations, including conspiracy, failure to train, failure to supervise, and a substantive due process claim under 42 U.S.C. § 1983. In its April 10, 2009, opinion, the district court granted summary judgment to the defendants on plaintiffs' federal claims and dismissed without prejudice their state law claims.[6] First, the district court granted summary judgment on plaintiffs' conspiracy claim under the intracorporate conspiracy doctrine. *See Meyers v. Starke*, 420 F.3d 738, 742 (8th Cir. 2005) (noting that "the intracorporate conspiracy doctrine . . . allows corporate agents acting within the scope of their employment to be shielded from constituting a conspiracy under [42 U.S.C.] § 1985" and that the doctrine has been "extended . . . to governmental entities"). Second, the court held that Officer Wright

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[6] The district court made certain to note that the Arkansas savings statute, Ark. Code Ann. § 16-56-126, protects plaintiffs' state law claims from any statute of limitations problems. *See Sitzes v. City of W. Memphis, Ark.*, No. 3:08-CV-00026, slip op. at 7 n.34 (E.D. Ark. Apr. 10, 2009) (*citing Carton v. Mo. Pac. R.R.*, 747 S.W.2d 93 (1988)). To our knowledge, plaintiffs' state law claims remain active.

did not have the intent to harm Brittney or Shelby when he struck their car, therefore his actions did not rise to the conscience-shocking level needed to sustain a substantive due process claim. Finally, because there was no underlying constitutional violation, the court granted summary judgment on the failure to train and failure to supervise claims against the city.

Plaintiffs appeal the district court's grant of summary judgment. They argue that the district court used an improper standard of culpability in determining whether Officer Wright's actions rise to the conscience-shocking level needed to establish a substantive due process claim and that there are genuine issues of material fact as to whether Officer Wright was responding to an emergency situation. Plaintiffs also argue that the district court erred in refusing to consider their failure to train and failure to supervise claims.

II.

We review the district court's grant of summary judgment de novo, viewing the facts in the light most favorable to the nonmoving party. *See Irving v. Dormire,* 586 F.3d 645, 647 (8th Cir. 2009). We will affirm the grant of summary judgment if "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Disputes that are not "genuine," or that are about facts that are not "material," will

not preclude summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

Our starting point for analyzing this type of substantive due process case is the Supreme Court's decision in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). In *Lewis*, the parents of Philip Lewis, a 16-year-old motorcycle passenger who was killed during a high-speed pursuit by police, brought a § 1983 action alleging a deprivation of Lewis's Fourteenth Amendment substantive due process right to life. *Id.* at 836-37. The district court granted summary judgment to the police officer on the basis of qualified immunity, *id.* at 837-38, but the Ninth Circuit reversed, "holding that the appropriate degree of fault to be applied to high-speed police pursuits is deliberate indifference to, or reckless disregard for, a person's right to life and personal security[.]" *Id.* at 838 (quotation omitted).

The Supreme Court reversed, holding that "in a high-speed automobile chase aimed at apprehending a suspected offender . . . only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a [substantive] due process violation." *Id.* at 836. In doing so, the Court identified a continuum of culpability in the substantive due process context. *See id.* at 848-50. At one end of the continuum is negligent conduct, which "is categorically beneath the threshold of constitutional due process." *Id.* at 849. At the other end is "conduct intended to injure in some way unjustifiable by any

government interest," which is the type "of official action most likely to rise to the conscience-shocking level." *Id.* Between those poles lies culpability for "something more than negligence but less than intentional conduct, such as recklessness or gross negligence," *id.* (quotations omitted), which, in at least some circumstances, states a substantive due process claim, *id.* (*citing City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239 (1983)).

The Court rejected this "midlevel" culpability standard in the context of highspeed police pursuits. *Id.* at 853-54. Analogizing such pursuits to prison riots, the Court refused to impose liability for deliberate indifference to human life "when unforeseen circumstances demand an officer's instant judgment," such as when deciding whether to pursue a fleeing suspect. *Id.* at 853. Instead, imposing substantive due process liability based on deliberate indifference is only appropriate "when actual deliberation is practical." *Id.* at 851. Thus, the Court held that "highspeed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment[.]" *Id.* at 854.

We applied this ruling in *Helseth v. Burch*, 258 F.3d 867 (8th Cir. 2001) (en banc). There, a driver was seriously injured when a suspect who was being pursued by police slammed into the driver's pickup truck. *Id.* at 869. The driver brought a § 1983 claim against the pursuing officer. *Id.* In reversing the district court's denial of qualified immunity, we held that "*Lewis* plainly stated that the intent-to-harm

standard, rather than the [lower] deliberate indifference standard, applies to *all* highspeed pursuits aimed at apprehending suspected offenders[,]" regardless of whether the officer truly had "ample time to deliberate." *Id.* at 871.

We applied the *Lewis* intent-to-harm standard again in *Terrell v. Larson*, 396 F.3d 975 (8th Cir. 2005) (en banc). There, deputy sheriffs, responding to a report of a woman threatening to harm her three-year-old daughter, drove through an intersection at approximately 60 m.p.h. and struck Talena Terrell's car, killing her. *Id.* at 977. Terrell's heirs brought a § 1983 action against the officers, alleging that their decision to respond and the operation of their vehicle violated Terrell's substantive due process rights. *Id.* The deputies moved for summary judgment, arguing that the plaintiffs had no evidence that the deputies intended to harm Terrell. *Id.* The district court held that summary judgment was improper because there was a dispute of fact as to whether the deputies were responding to an emergency. *Id.* at 977-78.

We reversed the district court, noting that "[t]he deliberate indifference standard is sensibly employed only when actual deliberation is practical[,]" *id.* at 978 (*quoting Lewis*, 523 U.S. at 848-49), and that "[b]y contrast, the intent-to-harm standard most clearly applies in rapidly evolving, fluid, and dangerous situations which preclude the luxury of calm and reflective deliberation[,]" *id.* (*quoting Neal v. St. Louis County Bd. of Police Comm'rs*, 217 F.3d 955, 958 (8th Cir. 2000)). In reversing, we expanded *Lewis*'s holding in

two significant respects. First, we held "that the intent-to-harm standard of *Lewis* applies to an officer's decision to engage in high-speed driving in response to other types of emergencies [besides the high-speed pursuit of a fleeing suspect], and to the manner in which the police car is then driven in proceeding to the scene of the emergency." *Id.* at 979. This extension of the intent-to-harm standard to situations other than high-speed pursuits was in line with other circuits that had considered the issue. *See id.* (citing cases). Second, because "substantive due process liability . . . turns on the government official's evil intent," we rejected the district court's objective consideration of what constituted an emergency and "conclude[d] that [the] issue turns on whether the deputies subjectively believed that they were responding to an emergency." *Id.* at 980. Because it was undisputed that the deputies believed they were responding to an emergency, the intent-to-harm standard was appropriate. *Id.* We left for another day the question of "whether a different rule should apply if an official's claim of perceived emergency is so preposterous as to reflect bad faith." *Id.* at 980 n.2.

It is against this legal background that we examine the present case. To establish a substantive due process violation, plaintiffs must show that "the behavior of [Officer Wright was] so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Lewis*, 523 U.S. at 847 n.8. Whether actions rise to this conscience-shocking level is contextual, depending in large part on the level of

culpability plaintiffs must prove that Officer Wright possessed. *Terrell*, 396 F.3d at 978. We must also keep in mind that substantive due process liability is narrow, applying only to the most egregious conduct, and that "the Fourteenth Amendment is not a 'font of tort law to be superimposed upon whatever systems may already be administered by the States[.]' " *Lewis*, 523 U.S. at 848 (*quoting Paul v. Davis*, 424 U.S. 693, 701 (1976)). "Because the conscience-shocking standard is intended to limit substantive due process liability, it is an issue of law for the judge, not a question of fact for the jury." *Terrell*, 396 F.3d at 981; *see also Collins v. City of Harker Heights*, 503 U.S. 115, 126 (1992).

The district court, relying primarily on *Terrell*, held that the *Lewis* intent-to-harm standard applied to Officer Wright's conduct. The court further held that Officer Wright was responding to an emergency and that, because there was no evidence that he intended to harm Brittney or Shelby, summary judgment was appropriate. Plaintiffs argue that this is not the type of situation to which the intent-to-harm standard properly applies. They argue that Officer Wright was responding to a nonemergency call, that he had time to evaluate his actions, and that we should not effectively absolve him from substantive due process liability based on his self-serving statement that he believed the situation at the Wal-Mart to be an emergency. Thus, plaintiffs argue that the lower deliberate indifference standard should apply here. Officer Wright counters that *Terrell* forecloses

any inquiry into whether the situation was objectively an emergency, and that his affidavit, stating that he believed he was responding to an emergency, is sufficient to require application of the intent-to-harm standard.

Although we are deeply troubled by Officer Wright's actions, we cannot say that the district court erred in applying the intent-to-harm standard in this case. First, we must reject plaintiffs' primary argument, which bases liability on the situation at Wal-Mart not being a "true" emergency. *Terrell* forecloses inquiry into the objective nature of the emergency, as substantive due process liability turns on the intent of the government actor. 396 F.3d at 980. Thus, the fact that the situation at the Wal-Mart was not as serious as those presented in *Helseth* or *Terrell*, or that it might not qualify as an "emergency" under the WMPD Policy and Procedure manual, is not determinative of the appropriate level of scrutiny. Neither is the fact, emphasized by the dissent, that Officer McDougal and others testified that they would never have driven in the manner that Officer Wright did, or that Officer McDougal responded to the situation at the Wal-Mart differently than Officer Wright. This would all be more relevant if our question was whether the situation was an objectively "true" emergency. However, it bears little relevance to the question of what Officer Wright subjectively believed, and is emblematic of the kind of "fact-intensive, hindsight-oriented approach" that is inappropriate in this context. *Helseth*, 258 F.3d at 871 n.2.

Second, although Officer Wright arguably had more time to deliberate on his actions than would an officer engaged in a high-speed pursuit, we do not "reject intent-to-harm as the governing standard whenever a judge or a jury could say, with the wisdom of hindsight, that an officer engaged in a high-speed pursuit had ample time to deliberate." *Id.* at 871 (quotation omitted). In *Terrell*, we held that officers who were ten miles away from the reported disturbance, who were eating dinner at a police substation at the time they received the call, and who were told twice by the police dispatcher that they need not respond to the call, nevertheless did not have "the luxury of calm and reflective deliberation" in deciding whether or not to respond. 396 F.3d at 978 (quotation omitted). Because the officers had to "make a quick decision how best to protect the public and maintain lawful order," we held that the intent-to-harm standard governed their actions. *Id.* at 979. The officers in *Terrell* clearly had more time to deliberate on their actions than Officer Wright did here. Thus, the amount of time Officer Wright had to deliberate on his actions is not, by itself, sufficient to render the intent-to-harm standard inapplicable.

Third, even assuming, as we must, that Officer Wright had neither his emergency lights nor his siren in operation, the fact remains that the only direct evidence of Officer Wright's subjective belief – his affidavit – indicates that he *did* perceive the situation at Wal-Mart to be an emergency. Recognizing this, plaintiffs and the dissent argue that we should not

take Officer Wright's belief at face value and that the fact that he did not have his emergency lights or siren activated is evidence that he did not truly perceive this to be an emergency. Although the plaintiffs did not stipulate in the district court that Officer Wright subjectively believed he was responding to an emergency, they did not question this belief at his deposition. Indeed, in their response to the defendants' Joint Statement of Material Facts Not in Dispute, they admitted that Officer Wright stated in his affidavit that he believed the situation to be an emergency, but argued that "the evidence is overwhelming that it was not." This is a challenge to the *objective* nature of the situation at the Wal-Mart, not the sincerity of Officer Wright's *subjective* belief. Thus, it appears that the question of Officer Wright's subjective belief may not have been presented to the district court. Likewise, on appeal, plaintiffs focus almost exclusively on the objective reasonableness of Officer Wright's avowed belief that he was responding to an emergency. Nevertheless, the dissent argues that a jury should have examined the veracity of Officer Wright's professed belief, along with its objective reasonableness. Although Officer Wright's failure to engage his emergency lights and siren is arguably incompatible with a belief that he was responding to an emergency, we conclude that an inquiry into the objective reasonableness of Officer Wright's belief is contrary to the intent of *Terrell,* which is to insulate police officers from liability when they believe they are responding to an emergency call.

Terrell implied, but did not explicitly hold, that a different rule might apply "if an official's claim of perceived emergency is so preposterous as to reflect bad faith." 396 F.3d at 980 n.2. In essence, this requires us to take at face value an officer's characterization of a situation as an emergency in all but the most egregious cases. Although this case approaches that bad faith line, it does not cross it. Viewing the record in the light most favorable to the plaintiffs, Officer Wright's belief that the theft of property and assault that occurred in the Wal-Mart parking lot constituted an emergency was likely mistaken and perhaps even unreasonable. Were it not for the language in *Terrell,* this unreasonableness might be enough to remove this case from the intent-to-harm realm of cases. However, we are bound by *Terrell,* and we find that Officer Wright's belief is not so preposterous as to reflect bad faith. Rather, the situation at Wal-Mart "lies somewhere in the vast middle ground," *Green v. Post,* 574 F.3d 1294, 1301 n.7 (10th Cir. 2009), between "clear" emergencies and "clear" nonemergencies. As such, the unreasonableness of Officer Wright's belief is not enough to render the intent-to-harm standard inapplicable here.

We agree with the dissent that our opinion should not be read to establish a rule that an officer can insulate himself from substantive due process liability, no matter the circumstances, by simply averring that he subjectively believed the situation to which he was responding was an emergency. *See Terrell,* 396 F.3d at 980 n.2. This could lead to the

absurd results forecasted by the dissent. For example, the dissent fears that this case could be used to insulate from substantive due process liability an officer who drove "100 miles per hour through a children's playground during recess time," or an officer who drove "the wrong way down an interstate highway . . . when responding to something as routine as a reported accident requiring traffic control[,]" as long as the officer stated that he believed the situation to be an emergency. *Infra* at 28. First, such cases are far beyond the factual scenarios of *Lewis, Helseth,* and *Terrell,* which involved officers using conventional emergency driving techniques to respond to perceived emergencies. Nothing in our opinion would countenance granting summary judgment in either of the two situations presented by the dissent. Second, we think it very likely that an officer who intentionally drove through a playground or the wrong way on an interstate highway could be held liable even under the intent-to-harm standard, regardless of the officer's avowed belief, at least absent some compelling exigency not described in the hypotheticals. In sum, we do not understand this case to establish a per se rule that an officer's self-serving affidavit will always insulate that officer from substantive due process liability. Instead, we simply hold that the plaintiffs have failed to create a genuine issue of fact as to Officer Wright's subjective belief and that this belief is not so preposterous as to reflect bad faith on the part of Officer Wright.

The dissent also cites two qualified immunity cases, *Moore v. Indehar*, 514 F.3d 756 (8th Cir. 2008), and *Felder v. King*, 599 F.3d 846 (8th Cir. 2010), for the proposition that, in some contexts, we look beyond an officer's professed subjective belief. Both cases dealt with officer-involved shootings and held that factual questions precluded summary judgment on the plaintiffs' § 1983 Fourth Amendment claims for excessive force. Importantly, neither case involved a substantive due process claim governed by *Lewis*, *Helseth*, and *Terrell*. Moreover, *Felder* was governed by the Fourth Amendment's *objective* reasonableness standard, *see Graham v. Connor*, 490 U.S. 386, 388 (1989), not the subjective standard at issue here. Thus, the fact that, in those cases, there was evidence sufficient to create a genuine issue of material fact does little to affect our analysis here.

For the reasons stated above, we hold that the intent-to-harm standard applies as a matter of law to Officer Wright's conduct.[7] Because there was no

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[7] Although we hold that the intent-to-harm standard applies to Officer Wright's conduct, we question whether the plaintiffs could have prevailed even under the deliberate indifference standard. *See Green v. Post*, 574 F.3d 1294, 1296-97, 1303-04 (10th Cir. 2009) (deputy sheriff's actions of traveling through an intersection at a high rate of speed, without his lights or sirens on, in response to a non-emergency call held to be negligent but not conscience-shocking under the deliberate indifference standard); *Leddy v. Twp. of Lower Merion*, 114 F. Supp. 2d 372, 374, 376 (E.D. Pa. 2000) (officer's actions of traveling at an excessive rate of speed, without his lights or sirens on, in response to a report of a suspicious parked vehicle

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evidence that Officer Wright intended to harm Brittney or Shelby Sitzes, the district court correctly granted summary judgment in favor of the defendants. While accidents such as this are tragic, they "do not shock the modern-day conscience." *Terrell*, 396 F.3d at 981. As such, they cannot form the basis of substantive due process liability.[8]

The district court also granted summary judgment to the defendants on plaintiffs' failure to train and failure to supervise claims, holding that such claims could not be sustained absent an underlying constitutional violation by the officer. We agree. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (per curiam); *Monell v. Dep't of Soc. Servs.*, 436 U.S.

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held to be negligent or even reckless, but not conscience-shocking under the deliberate indifference standard); *Daniels v. City of Dallas*, 272 F. App'x 321, 322-23 (5th Cir.) (unpublished per curiam), *cert. denied*, 129 S. Ct. 648 (2008) (officer's high-speed response to a nonemergency call, where he did not engage his lights or sirens, held not to be conscience-shocking under either intent-to-harm or deliberate indifference standard).

[8] Nothing in our opinion should be read to minimize the tragic nature of this accident. Viewing the record in the light most favorable to the plaintiffs, Officer Wright's actions were perhaps negligent, even reckless. Arguably, were it not for Officer Wright's profoundly poor judgment, this accident would not have happened. Nonetheless, we are bound to apply the law as we understand it, remembering that "the Fourteenth Amendment is not a font of tort law." *Lewis*, 523 U.S. at 848 (quotation omitted). Thus, we hold that Officer Wright's actions do not rise to the conscience-shocking level needed to sustain a substantive due process claim, and we leave the plaintiffs to their state law remedies.

658, 691 (1978) ("Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort."); *Sanders v. City of Minneapolis, Minn.*, 474 F.3d 523, 527 (8th Cir. 2007) ("Without a constitutional violation by the individual officers, there can be no § 1983 or *Monell* failure to train municipal liability.").

III.

For the reasons stated above, we affirm.

LANGE, District Judge, dissenting.

I respectfully dissent because when the record is appropriately viewed in the light most favorable to the Plaintiffs, a genuine dispute of material fact exists over whether Officer James Wright was truthful in professing a subjective belief that he was responding to an emergency when the collision that killed Brittney Sitzes occurred. Thus, under *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) and existing precedent, a question of fact exists that makes it improper to apply the intent-to-harm standard as a matter of law.

I. Material Facts.

A. The District Court Did Not Apply Rule 56 Properly in its View of the Facts.

This case involves an appeal from a grant of summary judgment. Summary judgment is only appropriate when the record demonstrates "that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. On appeal, this Court considers a grant of summary judgment de novo, applying the same standards as a district court. *Grayson v. Ross,* 454 F.3d 802, 808 (8th Cir. 2006). That is, both before the district court and on appeal, the court is obliged to construe the "record in the light most favorable to the non-moving party . . . and . . . afford [the non-moving party] all reasonable inferences to be drawn from that record." *Davis v. Hall,* 375 F.3d 703, 711 (8th Cir. 2004). Viewed in the light most favorable to the non-movants, the record reveals genuine disputes over whether Officer Wright is credible in his assertion that he subjectively believed that he was responding to an emergency.

The district court did not consider the facts in the light most favorable to the Plaintiffs. Indeed, the district court did not even note that there was a dispute over Officer Wright's claimed belief that he was responding to an emergency. The district court's background facts consisted of twelve sentences, three of which fail to properly view the facts in the light most favorable to the non-movant. First, the district

court stated that Wright "received a request for backup in apprehending suspects." In reality, the collision at issue occurred before the call for backup. Second, the district court assumed that Officer Wright "turned on his patrol car's emergency blue lights and siren," when no fewer than four eyewitnesses swore in affidavits that they heard no siren and no lights from Officer Wright's car. Third, the district court opinion accepted as true that Wright acted, "believing that he was responding to an emergency situation." Although the Defendants maintained in a joint statement of material facts that "Wright subjectively believed he was responding to an emergency situation," the Plaintiffs contested that claim with a response stating: "It is admitted that Wright asserts that, however, the evidence is overwhelming that it was not and the transcript only shows [that information provided to Wright was a call about] posing as security and had left the scene."

The majority opinion in this case properly recognizes the summary judgment standard and construes certain facts in favor of the Plaintiffs. However, the majority opinion does not set forth all of the material facts that undermine Officer Wright's credibility and raise genuine issues of material fact about his assertion of a subjective belief that an emergency existed.

B. Full Recitation of Material Facts in Light Most Favorable to Non-Movant.

Because a key question in this case is whether Officer Wright's professed subjective belief of an emergency is to be credited, some background on Officer Wright's credibility and conduct is necessary. Before the tragic death of Brittney Sitzes on February 21, 2007, other officers of the West Memphis Police Department ("WMPD") had complained about the cocky, arrogant, and argumentative attitude of Officer Wright. WMPD officers reported that they did not want to ride with Officer Wright. Shortly before the incident, the WMPD chief of police had informed Officer Wright that his status as an officer was under advisement because of a picture that Wright had posted on MySpace. The picture showed Officer Wright, in his police uniform, holding his service revolver in a shooting position pointed at the camera.[9]

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[9] Officer Wright after the accident posted an image containing four pictures on Facebook. The Facebook posting showed the same picture of Officer Wright pointing his service revolver at the camera. Above Officer Wright is an image of a WMPD patrol car with its lights flashing. To the right of Officer Wright is a skull with the legend "the PUNISHER." The Punisher is an "antihero," created by Marvel Comics in 1974 as an antagonist to Spider-Man. The Punisher "is a vigilante who considers killing, kidnapping, extortion, coercion, threats of violence, and torture to be acceptable crime fighting tactics." http://en.wikipedia.org/wiki/Punisher (last visited April 30, 2010). Just above the image of the skull is a picture of a person wearing the garb of the Punisher with guns in each hand.

On February 14, 2007, one week before the tragic collision at issue in this case, Officer Wright was involved in a somewhat similar motor vehicle accident with Dominique Robinson.[10] According to the affidavit of Robinson, he was driving his vehicle when "out of nowhere, a police car with no emergency sirens or flashing lights driven by Officer Wright went into the middle lane of traffic traveling at an extremely high rate of speed." Wright's police car struck Robinson's vehicle in the driver's side rear, spun Robinson's vehicle around, then traveled another 100 feet, struck a parked vehicle, and pushed it into another parked vehicle. The WMPD police chief on February 14 warned Officer Wright that he might be terminated and Officer Wright was taken off duty from February 14 until February 21, 2007.

Having been informed that his status as an officer was under advisement and on his first day back on duty following the February 14 motor vehicle accident, Wright was on duty on the afternoon of February 21, 2007. At around 3:45 that afternoon WMPD dispatch received a 911 call from Trenton Lemons, who reported that "people . . . claiming they work . . . at Wal-Mart in their security" had taken $50 or $55 from Lemons' friend's pocket and were walking away. The WMPD dispatcher had radio communication with Officer Charles Mark McDougal as follows:

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[10] Officer Wright previously had received a Letter of Reprimand and citation for another motor vehicle collision involving his police cruiser on July 26, 2006.

"798 West Service Road [Wal-Mart location]. Make contact with Trenton Lemons. This is going to be the garden center. (unintelligible) posing as security." Officer McDougal, who was assigned to cover the city as a whole, was the closest WMPD officer to the Wal-Mart at the time. Officer Wright, whose assigned area that afternoon included the Wal-Mart, but who evidently was not very close to the store, heard the call and responded that he would be in route too. Officer Wright wanted to take the report, according to his testimony, because the Wal-Mart was in his ward of the city.

The difference between how Officer McDougal and Officer Wright responded to the call is telling. Officer McDougal, who was approximately a mile and a half to two miles away from the Wal-Mart at the time of the call, drove at a normal speed and stopped at all stop signs going to the Wal-Mart. Officer McDougal did not have his lights on and described the call as "not that urgent of a call." Officer McDougal testified: "This call didn't justify any exorbitant speed or anything like that in my opinion."

By contrast, having heard the same initial call, Officer Wright responded aggressively, turned onto a residential road, accelerated to a speed at least 50 miles over the speed limit, and traveled at times in the wrong lane to pass other vehicles. Officer Wright twice in his deposition mischaracterized the dispatch

call, testifying that it was "armed robbery suspects fleeing."[11]

Trenton Lemons made a second 911 call to dispatch, which the officers would not have heard over the radio. During the call, Lemons identified himself as the person who had just called about someone taking $55. Lemons had confronted one of the two people, who in turn had pushed Lemons in the chest in a way where Lemons was struck in the face. Lemons reported that the security guard imposters were fleeing in an older red car with an Arkansas license plate. The dispatcher reported over the police radio the new report of an assault with the suspects leaving in a vehicle. In addition to Officer McDougal, a second WMPD officer arrived at or was nearly at the Wal-Mart. Officer McDougal spotted the red car and was in the process of calling in for backup because he was unsure whether the red car would stop. As Officer McDougal was making the call for backup, Wright broke in with "Get me an ambulance! Ambulance! Rich and Arlington. Rich and Arlington." Officer McDougal testified that his call for backup came after the point of Wright's collision. Officer Wright testified

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[11] Officer Wright's deposition testimony at pages 81 and 101 both refer to the dispatch call as describing an armed robbery. The dispatch call did not describe an armed robbery, and the individuals who had posed as security guards at Wal-Mart were unarmed when apprehended by Officer McDougal. In his statement for the police report of the accident, Officer Wright wrote that he was responding to an assault and he did not refer to an armed robbery.

that he never heard the call for backup because his police radio was not operable following the crash, and his request for an ambulance was made on a hand-held device approximately 10 to 15 seconds after impact.

To get to the Wal-Mart, Officer Wright had turned on Rich Road, which is a residential street with two lanes and no center line and a speed limit of 30 miles per hour. On Rich Road there are primarily single-family homes, along with schools, a sign indicating children at play, and commonly people out and about in the late afternoon. Officer Wright, who grew up in West Memphis and testified he was very familiar with the neighborhood, was traveling at least 79 miles per hour down Rich Road northbound in a southbound lane in his 2006 Ford Crown Victoria police car. Up ahead of Wright's car, Brittney Sitzes ("Brittney") was driving a 2001 Oldsmobile Alero northbound on Rich Road, with her little sister Shelby Sitzes ("Shelby") as a passenger. Brittney was in the process of making a left turn from Rich Road to Arlington Road, when Officer Wright's patrol car struck the driver's side door. The momentum of Wright's car pushed the Sitzes car sideways 142 feet, until it slammed up against a tree in a resident's front yard. Wright's car then separated from the Sitzes car and traveled another approximately 84 feet across the street to the northeast. Brittney died at the scene, and her sister Shelby was seriously injured.

Eyewitnesses are split on whether Officer Wright even had his lights and sirens on before the collision. A person out for a jog along Rich Road described a first vehicle coming through with lights and sirens on and then a second vehicle "traveling at the excessively dangerous high rate of speed of 80 to 90 miles per hour never slowing at the intersection and passing several cars in the process," causing the accident. This jogger described the neighborhood as one full of "children and pedestrians, joggers, and bicycling," and "within about a mile of several schools, and an elementary school," with "children going home from school around the time of the accident." Four people living on Rich Road were outside their houses at the time of the accident; all four testified that they did not hear any siren or see any emergency lights prior to impact, although one remembers hearing a "whoosh" sound just before the impact. After the impact, these people saw no lights on the patrol car and heard no siren from Officer Wright's car. The majority decision properly infers, taking the facts in the light most favorable to the non-movants, that Officer Wright did not have his lights and siren on at the time.[12] Wright testified that he was able to get out of his vehicle and called for assistance right away.

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[12] There were motorists who pulled aside after hearing a police siren. As with other issues in this case, an issue of fact exists here for trial. However, the inference can and should be drawn based on Rule 56 of the Federal Rules of Civil Procedure that Wright did not have his lights and sirens on, which would

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The investigation of the accident was done by Arkansas Highway Patrol Officer Flarcell Tate ("Trooper Tate"). Trooper Tate testified that, based on the physical evidence, Officer Wright was traveling at least 80 miles per hour at the time of the impact. Trooper Tate testified that there was no circumstance where a police officer should be driving that fast on Rich Road "even if there is a bomb ticking at an elementary school." An accident reconstruction expert later estimated the speed of the Wright vehicle at impact at between 79 and 86 miles per hour based on the physical evidence.

Officer McDougal, who as stated above heard the same radio calls and deemed it "not that urgent"[13] and one that did not "justify any exorbitant speed," expressed "shock" that someone would drive 70 to 80 miles per hour on Rich Road, which he noted was a street where people, including children, are frequently outside during the day. A West Memphis city council member testified in this case "that it would

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be further circumstantial evidence that he did not truly believe the dispatched call to create an emergency situation.

[13] The WMPD Policy and Procedure manual contains a "Classification of Response," recognizing three categories of response: a) "Routine," where the response is to include obeying all traffic laws; b) "Urgent," where intermittent use of blue lights and sirens are used; and c) "Emergency," where continuous sirens and lights are used. The emergency response is for situations of officer down or needs assistance, serious felonies in progress and serious accidents, fires, or other circumstances with potential for disaster.

shock me to know that officers of the WMPD was [sic] traveling 80 miles per hour into opposing traffic, after school let out on Rich Road."

A sociologist hired as an expert by the Plaintiffs opined that "what Officer Wright heard on the radio presented a threat to the public that had either ended or was under control . . . his presence at the crime scene was not essential." The expert also opined: "The driving of Officer Wright was shocking, willful, wanton, displayed a total indifference to the public and himself. It served no legitimate law enforcement purpose."

II. Section 1983 Claim.

The Fourteenth Amendment to the United States Constitution protects against the government or a state actor, like Officer Wright, depriving a person of life, liberty or property without due process of law. Section 1983 provides for a cause of action in federal court for a violation of the substantive due process guarantee of the Fourteenth Amendment. Because the actions of the state, through on-duty police officer James Wright, were the cause of Brittney's loss of life and substantial injury to her sister Shelby, the substantive due process protection of the Fourteenth Amendment may be implicated here. *See Ohio Adult Parole Authority v. Woodard,* 523 U.S. 272 (1998).

The analysis of whether a claim exists under these circumstances begins with *County of Sacramento v. Lewis,* 523 U.S. 833 (1998). In *Lewis,* the Supreme Court of the United States considered whether

a police officer violates the Fourteenth Amendment's guarantee of substantive due process by causing death through a high speed automobile chase aimed at apprehending a suspected offender. *Id.* at 836. The Court held that there was no violation of the Fourteenth Amendment under the circumstances in *Lewis,* because the police had no time to deliberate, did not intend to cause harm, and thus engaged in conduct that "does not shock the conscience." *Id.* at 855.

In *Lewis,* the police officers were in pursuit of a motorcyclist who had avoided a police stop and sped away. The Court in *Lewis* stated that a due process clause violation exists "only when [the police conduct] 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.'" *Id.* at 847 (citing *Collins v. City of Harker Heights,* 503 U.S. at 128). The Court in *Lewis* then noted that conduct intended to injure was most likely to be conscience shocking, and whether conduct of a lesser nature – "less than intentional conduct, such as recklessness or 'gross negligence'" – could justify a claim of a violation of substantive due process would be a closer call. *Lewis,* 523 U.S. at 849 (quoting *Daniels v. Williams,* 474 U.S. at 334, n.3). The Court in *Lewis* then emphasized that analysis of whether an actionable claim exists for violation of constitutional due process is a fact intensive decision. The Court in *Lewis* stated:

> Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of

> substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking.

Id. at 8508. The Court in *Lewis* then cited a previous case to the effect that a denial of due process rights is to be "tested by an appraisal of the totality of facts in a given case." *Id.* (quoting *Betts v. Brady,* 316 U.S. 455, 462 (1942)).

The Court in *Lewis* then clarified that "deliberate indifference" of a conscience shocking nature would support a due process claim "only when actual deliberation is practical." *Id.* at 851. However, for "sudden police chases," such as the one at issue in *Lewis,* a higher standard of conduct – an "intent to harm" – is necessary for there to be liability under the Fourteenth Amendment, redressable by an action under Section 1983. *Id.* at 854. In footnote 13 in *Lewis,* the Court further made clear that negligent use of an officer's vehicle is not a Section 1983 claim, but intentional misuse of the vehicle does support a Section 1983 claim. *Id.* at 854, n.13 (quoting *Checki v. Webb,* 785 F.2d 534, 538 (5th Cir. 1986)). The Court noted in closing that the officers' conduct in *Lewis* was an "instinctive response" to a motorist evading a stop and then speeding off. *Id.* at 855.

In *Helseth v. Burch,* 258 F.3d 867 (8th Cir. 2001), and in *Terrell v. Larson,* 396 F.3d 975 (8th Cir. 2005), this Court applied and extended the ruling in *Lewis.* In *Helseth,* the Court applied the intent-to-harm standard of *Lewis* to "all Section 1983 substantive

due process claims based on the conduct of public officials engaged in a high speed automobile chase aimed at apprehending a suspected offender." *Helseth,* 258 F.3d at 871. In *Helseth,* the police were in pursuit of an intoxicated driver who had sped past police cars at 111 miles per hour and then had engaged in driving designed to elude the police. The intoxicated motorist ultimately collided with a vehicle driven by Plaintiff Helseth, killing Helseth's passenger and seriously injuring Helseth. Thus, in both *Lewis* and *Helseth,* the high speed chases were aimed at apprehending motorists who had engaged in illegal conduct and were seeking to elude the police. Under those circumstances, unquestionably, the "intent to harm" standard applies, as law enforcement officers must be allowed to pursue and stop motorists committing crimes in process without fear of suits over the consequences of such high speed chases of fleeing suspects.

The circumstances in *Terrell* were different. In *Terrell,* a radio dispatcher transmitted a call that a 23-year-old female had locked herself and her 3-year-old child in a room and was threatening to harm the 3-year-old child. *Terrell,* 396 F.3d at 977. The dispatcher assigned the call a priority level three, described as a "very high priority." *Id.* Two sheriff's deputies were on duty, but eating at a substation ten miles away. They responded to the call as backup, although they were told that they did not have to do so, and were going through an intersection, apparently against a red light, when they struck a vehicle and killed the driver.

In *Terrell,* the Court appropriately noted that the deliberate indifference standard "is sensibly employed only when actual deliberation is practical." *Id.* at 978 (quoting *Lewis,* 523 U.S. at 851). The Court also noted that "the intent to harm standard most clearly applies 'in rapidly evolving, fluid and dangerous situations which preclude the luxury of calm and reflective deliberation.'" *Terrell,* 396 F.3d at 975 (quoting *Neal v. St. Louis County Bd. of Police Comm'rs,* 217 F.3d 955, 958 (8th Cir. 2000)). The Court then noted that the officers were responding to an "emergency domestic disturbance," and such situations are "'notoriously volatile and unpredictable.'" *Id.* at 979 (quoting *Elwood v. Rice County,* 423 N.W.2d 671, 678 (Minn. 1988)). The *Terrell* court then noted that the number of police officers needed to defuse an emergency domestic disturbance rarely would be known in advance and that officers would have to make quick decisions akin to those made by the officers in *Lewis,* because "responding to this type of emergency call [does not provide] 'the luxury . . . of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations.'" *Id.* at 979 (quoting *Lewis,* 523 U.S. at 853). After all, *Terrell* involved a call of a three-year-old being held hostage in a room by someone threatening to do harm to the child. The circumstance, as with pursuing a motorist actively fleeing the police, is a different type of situation, indeed is an emergency, unlike the initial call about people impersonating security guards at Wal-Mart having taken $50 to $55 and walking away.

The Court in *Terrell* extended *Lewis* in determining that, in evaluating whether a deliberate indifference or intent-to-harm standard applies, the "issue turns on if the deputies subjectively believe that they were responding to an emergency." *Id.* at 980. In a footnote, the opinion stated that: "We need not consider whether a different rule should apply if an official's claim of perceived emergency is so preposterous as to reflect bad faith." *Id.* at n.2.[14] In the case

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[14] The decision in *Terrell* cited no authority for either this proposition or the subjective belief proposition. The *Terrell* decision was an en banc decision, in which Judges Lay, Heaney and Bye dissented and noted on this point the following:

> The majority creates an unknown rule of law that requires the § 1983 plaintiff, at the summary judgment stage, to establish the officer's subjective state of mind regarding the existence of an emergency. While we agree with the majority that a Section 1983 plaintiff must establish an "evil intent" in the form of criminal recklessness under the deliberate indifference standard to establish ultimate liability, we part company with the majority when it states that judicial review of the facts surrounding the case must start and end with an inquiry into the officer's subjective state of mind. We note the majority cites no authority for this novel approach.

Terrell, 396 F.3d at 982 n.3 (Lay, Circuit Judge, dissenting). Footnote 2 in the opinion in *Terrell* is dicta. By its terms the opinion noted this was something the Court did not need to consider. *Terrell* cannot and should not be read to create a rule where a statement in an affidavit about an officer's subjective belief completely negates substantial contradictory evidence, or that the principles of Rule 56 do not apply to determine whether a question of fact exists on whether the officer truly believed an emergency existed.

at hand, there is no evidence nor reason to believe that Officer Wright intended to harm Brittney and Shelby Sitzes. However, the true issue in this case is whether the affidavit in which Officer Wright stated his subjective belief that he was responding to an emergency deserves to be credited or is "so preposterous as to reflect bad faith." On this particular question, there exists a genuine dispute as to material fact and ample evidence to question the credibility of Officer Wright and his statement.

The record supports the inference that Officer Wright, according to complaints from his fellow officers, was cocky and arrogant and had poor judgment and a propensity to not consider the consequences of his conduct. The WMPD had chastised him for posting on MySpace a picture of himself in his police uniform pointing his service revolver at a camera. He subsequently posted the same picture on Facebook with a picture of a WMPD patrol car and images from the Punisher, a fictional character that acts without regard to consequences and metes out justice in vigilante fashion without regard to law.

One week before the accident at issue, Officer Wright had been involved in a substantially similar motor vehicle accident, where he was speeding through an intersection without lights and sirens on, and without being mindful of another motorist. He was warned that his status as an officer was under advisement and was off duty until the day of the accident.

At the time of the radio call, Officer Wright was not the one closest to the Wal-Mart store, even though the Wal-Mart store was in his assigned area. Officer McDougal was the closest and Officer Tatum apparently was closer as well. The motives of Officer Wright in responding in the manner he did are subject to question. A reasonable inference from this record can be drawn that Officer Wright was rushing to get to the scene, not because he truly perceived it as an emergency, but rather because it was in his assigned area and he wanted to write the police report, his status as an officer was under advisement, it was his first day back on the job, he wanted to get to the scene of where some action was, and perhaps he enjoyed the adrenaline rush of driving in a reckless manner.

By contrast with the actions of Officer Wright, Officer McDougal, who heard the same call and was closest, did not exceed the speed limit, did not have his lights and sirens on, considered the call "not that urgent of a call," and testified that the call "didn't justify any exorbitant speed or anything like that." Officer McDougal's response was consistent with the nature of the call and the WMPD Policy and Procedure manual. The call did not qualify for an "emergency" response under those policies and procedures.

Officer Wright, the record reflects, misrepresented, or perhaps even lied, about the nature of the call. Twice during his deposition, he referred to it as an armed robbery call. The initial call was that someone was impersonating a security guard, and then there

was a subsequent call (after Officer Wright already had chosen to drive recklessly) about there being an assault. The record, and the timing of the accident, is unclear as to whether he heard the second call prior to the collision.[15] In addition, Wright testified that he was unsure if he was going more than 30 miles per hour, which calls into question his credibility when accident reconstruction analysis puts Officer Wright's speed at between 79 and 86 miles per hour at impact.

There exists a question of fact, inappropriate for summary judgment, on whether the claimed subjective belief of the existence of an emergency is legitimate or is "so preposterous as to reflect bad faith." The evidence, when viewed in the light most favorable to the non-movants, indicates that Officer Wright – just like Officer McDougal did – had time to deliberate and realize that this call was not an emergency. Thus, the question becomes whether the conduct of Officer Wright constitutes deliberate indifference of a nature that is "conscience shocking, in a constitutional sense." *Lewis*, 523 U.S. at 847 (quoting *Collins v.*

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[15] It is possible that Officer Wright heard the call about it being an assault before the collision. The call for backup from Officer McDougal, however, came contemporaneous with the motor vehicle accident and indeed Officer Wright breaks in during Officer McDougal's call to dispatch to call for an ambulance. Officer McDougal testified that his call for backup came after the collision involving Officer Wright had occurred, and Officer Wright acknowledged that he did not hear the call for backup because his radio was not operable following the collision.

City of Harker Heights, 503 U.S. at 128). Tellingly, Officer McDougal testified that he would never drive down Rich Road, where people are walking and when children are out, at 70 to 80 miles per hour under any circumstance. Similarly, Trooper Tate, who investigated the accident, said he would never drive down Rich Road at 80 miles per hour, even if there was a bomb at an elementary school. A city council member and expert similarly expressed shock at the driving of Officer Wright. The conduct of Officer Wright, likewise, shocks my conscience when the facts properly are viewed in the light most favorable to the Plaintiffs.

This Court cannot establish a rule, and indeed the majority decision should not be read to establish a rule, that an affidavit from an officer stating that he subjectively believed an emergency existed is enough to justify summary judgment and insulate the officer from any responsibility for controlling his vehicle.[16] A rule of this nature would emasculate the protection of the Fourteenth Amendment as it relates to conduct of

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[16] This writer takes some comfort that the majority opinion now makes clear that no such rule exists and that "an officer [cannot] insulate himself from substantive due process liability, no matter the circumstances, by simply averring that he subjectively believed the situation to which he was responding to be an emergency." With that being the case, a more complete consideration of the facts, as in this dissent, is required to evaluate whether a genuine issue of material fact exists over whether an officer's professed subjective belief of an emergency deserves to be credited.

officers with their vehicles. Indeed, if that were the law, an officer could avoid Section 1983 liability for driving 100 miles per hour through a children's playground during recess time, by stating that he subjectively believed there was an emergency and the path through the playground was the most direct to get to the claimed emergency. An officer could justify driving the wrong way down an interstate highway based on an affidavit stating a subjective belief of an emergency, when responding to something as routine as a reported accident requiring traffic control.[17] The decision in *Lewis* and the subsequent decisions from this Court in *Helseth* and *Terrell* should not be read to insulate officers from Section 1983 liability based merely on an affidavit expressing a subjective belief of the existence of an emergency.

Indeed, other cases from this Court recognize that an officer's professed subjective belief does not control whether a Section 1983 case can survive

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[17] This writer again takes comfort that the majority now views these examples as ones where summary judgment would be inappropriate and, indeed, that such conduct may expose an officer to liability under the intent-to-harm standard. While these illustrations are "far beyond the factual scenarios of *Lewis*, *Helseth*, and *Terrell*," they are not so far removed from the situation in this case, where an officer drives on a residential street in the wrong lane of travel at approximately 80 miles per hour when there are pedestrians and other traffic present, has a history of misbehavior of a similar ilk, and substantial evidence undermines the credibility of the officer's professed belief of an emergency, including the testimony of even his fellow officer responding to the same call.

summary judgment. For example, in the recent case of *Moore v. Indehar*, 514 F.3d 756 (8th Cir. 2008), the Court reversed a district court's grant of an officer's motion for summary judgment on qualified immunity grounds. In *Moore*, an officer had shot an unarmed man as he fled. *Id.* at 758. The injured person brought a Section 1983 claim. The officer testified that he was not firing at the unarmed plaintiff but at his armed companion who had fired shots. *Id.* at 761. The officer testified that he missed and accidentally hit the plaintiff's arm. *Id.* This Court reversed summary judgment because, viewing the facts in the light most favorable to the plaintiff, a genuine issue existed over the credibility of the officer's testimony. *Id.* at 761-62.[18]

Earlier this year, in *Felder v. King*, 599 F.3d 846 (8th Cir. 2010), this Court affirmed the denial of officers' motion for summary judgment on a qualified immunity defense notwithstanding the officers' testimony about their belief as to what was occurring. In *Felder*, the officers described having to shoot a

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[18] Among the evidence creating a genuine issue of material fact included the officer's training, which the Court found contradicted his testimony regarding his subjective belief. *Id.* at 762. Here, the WMPD Policy and Procedure manual required that officers responding to emergencies "shall respond quickly and safely to the call/incident utilizing blue lights and siren continuously to signal other vehicles." When coupled with eyewitness testimony that Officer Wright's lights and sirens were not activated, this evidence further reveals a genuine issue of material fact regarding his subjective belief.

person they had pursued and were apprehending because he had grabbed an officer's gun. *Id.* at 847-48. The Court in *Felder* noted eyewitness and expert testimony contradicting the officers' testimony of events. *Id.* at 848.[19]

As with *Moore* and *Felder*, this case presents a situation where an officer's testimony conflicts with other witnesses and evidence. Likewise, summary judgment is not appropriate here.

Without question, law enforcement officers deserve protection from Section 1983 suits for conduct that is taken without an opportunity to deliberate under situations that are actual emergencies. However, the situation in this case was not an emergency. Officer Wright's affidavit alone does not transform the situation into an emergency. This is not to imply that an objective standard should govern whether an emergency exists. Rather, when there is substantial evidence to create a question of fact as to whether the

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[19] The majority notes that "*Felder* was governed by the Fourth Amendment's *objective* reasonableness standard." However, in *Felder*, the Court noted, "the officers do not make a legal argument that . . . their conduct at the 'critical time' was objectively reasonable. Instead, they insist that their account of the 'critical time' controls." 599 F.3d at 849. The Court in *Felder* did not summarily credit the officers' accounts, but found there to be a genuine dispute as to whether the officers' accounts were credible. Both *Moore* and *Felder* stand for the proposition that an officer's professed subjective belief in a Section 1983 case may not justify summary judgment on its own, especially when there is evidence contradicting the professed subjective belief.

officer legitimately believed there to be an emergency such that the officer's credibility is in doubt, then summary judgment is inappropriate. Because issues of fact inappropriate for summary judgment exist here, I dissent with respect to summary judgment on the Section 1983 claim.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 09-2090

Brant Sitzes, Individually & as Joint Administrator of Estate of Brittney Rae Sitzes, Deceased; & as Parent & Next Friend of Shelby L. Sitzes, a Minor; Nancy Sitzes, Individually, as Joint Administrator of Estate of Brittney Rae Sitzes, Deceased, & as Parent & Next Friend of Shelby L. Sitzes, a Minor.,

Plaintiffs-Appellants

v.

City of West Memphis Arkansas; William H. Johnson, Individually & in Official Capacity as Mayor of West Memphis, AR; Robert Paudert, Individually & in Official Capacity as Cheif of Police, West Memphis, AR; James Wright, Individually & in Official Capacity as Police Officer in West Memphis, AR; Arkansas Municipal League; West Memphis City Council,

Defendants-Appellees

Appeal from U.S. District Court for the
Eastern District of Arkansas – Jonesboro
(3:08-cv-00026-WRW)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

June 04, 2010

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

BRANT SITZES, *et al.* **PLAINTIFFS**

v. **3:08-CV-00026-WRW**

CITY OF WEST MEMPHIS, ARKANSAS, *et al.* **DEFENDANTS**

ORDER

(Filed Apr. 10, 2009)

Pending are Defendants' Motion for Summary Judgment (Doc. No. 17) and Separate Defendant James Wright's ("Wright") Motion for Summary Judgment (Doc. No. 20). Plaintiffs have responded.[1]

Plaintiffs bring this action alleging that Wright, the City of West Memphis, Arkansas, and various city officials are liable to Plaintiffs for constitutional violations, common law injuries, and punitive damages stemming from an accident that occurred on February 21, 2007. For the reasons set out below, Defendants' motions are GRANTED. Plaintiffs' federal claims are DISMISSED with prejudice; however, Plaintiffs' state tort law claims are DISMISSED without prejudice.

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[1] Doc. Nos. 28-29.

I. BACKGROUND

The facts of this case are paraphrased below based on the parties' Undisputed Statements of Material Facts:[2]

> On February 21, 2007, Wright, at the time an officer with the West Memphis Police Department ("WMPD"), received a request for backup in apprehending suspects in an alleged theft of property and assault. Wright notified the dispatcher that he was en route to the scene of the reported crime to assist the initial responding officer. He allegedly turned on his patrol car's emergency blue lights and siren. Believing that he was responding to an emergency situation, Wright drove north on Rich Road at a rate well above the posted speed limit. Wright soon reached the intersection of Rich Road and Arlington Road, where there is no stop or yield sign for drivers traveling north on Rich Road. Wright entered the southbound lane to pass civilian vehicles in front of him.
>
> At this time, Brittney Sitzes ("Brittney") was ahead of Wright, and she was also traveling northbound on Rich Road, in the same lane that Wright was originally traveling. She turned left entering the southbound lane. Wright did not intend to collide with Brittney's car, but he was unable to stop his patrol car. As a result of the collision,

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[2] See Doc. Nos. 19, 27.

> Brittney was killed and her sister, Shelby Sitzes ("Shelby"), was injured. Wright immediately radioed police dispatch to request emergency medical assistance. Wright then approached Stizes' vehicle to provide medical assistance.
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> Wright was later terminated from the WMPD for disciplinary reasons unrelated to the accident involving Brittney and Shelby.
>
> On February 15, 2008, Plaintiffs Brant Sitzes and Nancy Sitzes, divorced parents of Brittney and Shelby, filed this action on behalf of Shelby, as well as Brittney's estate.

II. STANDARD

Summary judgment is appropriate only when there is no genuine issue of material fact, so that the dispute may be decided on purely legal grounds.[3] The Supreme Court has established guidelines to assist trial courts in determining whether this standard has been met:

> The inquiry performed is the threshold inquiry of determining whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of

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[3] *Holloway v. Lockhart*, 813 F.2d 874 (8th Cir. 1987); Fed. R. Civ. P. 56.

> fact because they may reasonably be resolved in favor of either party.[4]

The Court of Appeals for the Eighth Circuit has cautioned that summary judgment is an extreme remedy that should only be granted when the movant has established a right to the judgment beyond controversy.[5] Nevertheless, summary judgment promotes judicial economy by preventing trial when no genuine issue of fact remains.[6] I must view the facts in the light most favorable to the party opposing the motion.[7] The Eighth Circuit has also set out the burden of the parties in connection with a summary judgment motion:

> [T]he burden on the party moving for summary judgment is only to demonstrate, *i.e.*, "[to point] out to the District Court," that the record does not disclose a genuine dispute on a material fact. It is enough for the movant to bring up the fact that the record does not contain such an issue and to identify that part of the record which bears out his assertion. Once this is done, his burden is discharged, and, if the record in fact bears out the claim that no genuine dispute exists on any material fact, it is then the respondent's burden to set forth affirmative evidence,

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[4] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

[5] *Inland Oil & Transp. Co. v. United States*, 600 F.2d 725, 727 (8th Cir. 1979).

[6] *Id.* at 728.

[7] *Id.* at 727-28.

> specific facts, showing that there is a genuine dispute on that issue. If the respondent fails to carry that burden, summary judgment should be granted.[8]

Only disputes over facts that may affect the outcome of the suit under governing law will properly preclude the entry of summary judgment.[9]

III. DISCUSSION

Defendants seek summary judgment on Plaintiffs' conspiracy, § 1983,[10] failure to train, and failure to supervise claims.[11] Additionally, Defendants argue that if summary judgment is granted on Plaintiffs' federal law claims, Plaintiffs' state law tort claims should also be dismissed.[12]

A. Conspiracy

Defendants contend that Plaintiffs' conspiracy claims are barred under the intracorporate conspiracy doctrine, which provides that corporate agents, acting within the scope of their employment, are

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[8] *Counts v. MK-Ferguson Co.*, 862 F.2d 1338, 1339 (8th Cir. 1988) (quoting *City of Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 273-74 (8th Cir. 1988) (citations omitted)).

[9] *Anderson*, 477 U.S. at 248.

[10] 42 U.S.C. § 1983.

[11] Doc. Nos. 18, 21.

[12] Doc. No. 21.

shielded from conspiracy liability under § 1985.[13] Defendants point out that "[t]he Eighth Circuit has extended the intracorporate conspiracy doctrine to governmental entities."[14] I agree with Defendants, and Plaintiffs failed to address this argument in their brief.[15] Accordingly, Defendants' motion, as it relates to Plaintiffs' conspiracy claims, is GRANTED.

B. § 1983

Defendants seek summary judgment with respect to Plaintiffs' § 1983 claims arguing that there is not "an underlying constitutional violation."[16] To establish a substantive due process claim, a plaintiff must show that the official's behavior was "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."[17] The level of culpability to be applied depends largely on whether the official had time to reflect upon his actions. When "unforeseen circumstances demand an officer's instant judgment," a conscience will be shocked only if the officer was motivated by an intent to harm.[18] In contrast, where

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[13] Doc. No. 18.

[14] *Id.* (citing *Meyers v. Starke*, 420 F.3d 738, 742 (8th Cir. 2005); *Richmond v. Bd. of Regents*, 957 F.2d 595, 598 (8th Cir. 1992)).

[15] See Doc. No. 31.

[16] Doc. No. 18.

[17] *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998).

[18] *Lewis*, 523 U.S. at 853-54.

actual deliberation is practical, such as in custodial prison situations, an official's mere deliberate indifference may amount to a conscience-shocking level.[19] An integral question is whether the official was required to make decisions "in haste, under pressure, and without the luxury of a second chance."[20]

In *Terrell v. Larson*,[21] the Eighth Circuit applied the intent to harm standard in a situation very similar to the facts here. In *Terrell*, two deputy sheriffs received a high-priority call concerning a domestic disturbance within their assigned area.[22] Driving at high speed with emergency lights flashing and siren blaring, the deputies ran a red light, collided with the plaintiff, and killed her.[23] The Eighth Circuit applied the intent to harm standard to the officers' conduct because "police officers responding to this type of emergency call do not have 'the luxury . . . of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations.'"[24] The court further held that an intent to harm standard is applicable even if the situation was not an objectively "true" emergency so long as the officers subjectively

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[19] *Id.* at 850-51.

[20] *Whitley v. Albers*, 475 U.S. 312, 320 (1986).

[21] 396 F.3d 975 (8th Cir. 2005).

[22] *Id.* at 977.

[23] *Id.*

[24] *Id.* at 979 (quoting *Lewis*, 523 U.S. at 853).

"believed they were responding to an emergency call."[25] The Eighth Circuit concluded that even if a deliberate indifference standard of fault applied, the substantive due process claim would still fail because the officers' conduct was not "'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'"[26] The court stated that "[t]raffic accidents of this nature are tragic, but do not shock the modern-day conscience."[27]

Based on the record, there is no evidence that Wright intended to harm Brittney or Shelby, or that he acted maliciously. Wright was responding to an emergency situation, and even if Wright's behavior was negligent or reckless, it is not so egregious or outrageous as to shock the conscience.[28] Wright's conduct does not raise an issue of substantive due process.

Defendants contend, and I agree, that, absent a constitutional violation by Wright, the substantive due process allegations against all of the other Defendants also fail.[29] Therefore, Defendants' motion, as

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[25] *Id.* at 980 n.2.

[26] *Id.* at 980-81 (quoting *Lewis*, 523 U.S. at 847 n.8).

[27] *Terrell*, 396 F.3d at 981.

[28] *Id.* ("Because the conscience-shocking standard is intended to limit substantive due process liability, it is an issue of law for the judge, not a question of fact for the jury.").

[29] Doc. No. 18 (citing *Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the

(Continued on following page)

it relates to Plaintiffs' substantive due process claims, is GRANTED.

C. Failure to Train/Supervise

Because I find that there is no underlying constitutional violation, I will not address Plaintiffs' claims against the city for failure to train and failure to supervise. "The Eighth Circuit has repeatedly held that a municipality cannot be liable for inadequate training or supervision when the officer did not violate a plaintiff's constitutional rights."[30] Defendants' motion is GRANTED with respect to Plaintiffs' failure to train and failure to supervise claims.

D. State Law Tort Claims

Plaintiffs also allege state law tort claims for assault, battery, outrage, negligence, gross negligence, and wrongful death. Defendants contend that if I grant summary judgment on all of Plaintiffs' federal law claims, I should also dismiss Plaintiffs' remaining claims because of a lack of an independent basis of federal jurisdiction.[31]

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departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point.")).

[30] *Id.* (citing *Veneklase v. City of Fargo*, 248 F.3d 738, 748 (8th Cir. 2001); *Olinger v. Larson*, 134 F.3d 1362, 1367 (8th Cir. 1998); *Brodnicki v. City of Omaha*, 75 F.3d 1261, 1266 (8th Cir. 1996)).

[31] Doc. No. 21 (citing 28 U.S.C. § 1367(c)(3)).

Under 28 U.S.C. § 1367(c)(3), a district court may decline to exercise supplemental jurisdiction over a claim if "the district court has dismissed all claims over which it has original jurisdiction." When deciding whether to allow a case to proceed to trial solely on a state cause of action, the Court should consider the "investment of judicial time and resources as well as other factors such as convenience, fairness, and comity [which] may justify the exercise of jurisdiction over the state claims after the federal claim has been dismissed from the suit."[32]

Defendants argue that Plaintiffs' remaining state law tort claims "are dealt with on a daily basis in Arkansas state court and are best heard there."[33] It appears that Arkansas state court is a more appropriate forum for Plaintiffs' tort claims. Accordingly, I decline to exercise supplemental jurisdiction. All of Plaintiffs' state law tort claims are DISMISSED without prejudice.[34]

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[32] *Murray v. Wal-Mart, Inc.*, 874 F.2d 555, 558 (8th Cir. 1989).

[33] Doc. No. 18.

[34] It should be noted that if Plaintiffs choose to refile their tort claims in state court, it appears that the Arkansas "savings statute" protects Plaintiffs from any statute of limitations issue. See Ark. Code Ann. § 16-56-126; *Carton v. Missouri Pac. R.R. Co.*, 295 Ark. 126 (1988) (holding that a plaintiff who suffers a dismissal in federal court may take advantage of the savings statute to refile in state court so long as the plaintiff refiles within the one year requirement).

CONCLUSION

Based on the findings of fact and conclusions of law above, Defendants' Motion for Summary Judgment (Doc. No. 17) is GRANTED, separate Defendant Wright's Motion for Summary Judgment (Doc. No. 20) is GRANTED, and this case is DISMISSED in its entirety. Plaintiffs' conspiracy, § 1983, and failure to train, and failure to supervise claims are DISMISSED with prejudice; however, Plaintiffs' state tort law claims are DISMISSED without prejudice.

IT IS SO ORDERED this 10th day of April, 2009.

/s/ Wm. R. Wilson, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

BRANT SITZES, *et al.* **PLAINTIFFS**

v. **3:08-CV-00026-WRW**

CITY OF WEST MEMPHIS, ARKANSAS, *et al.* **DEFENDANTS**

JUDGMENT

(Filed Apr. 10, 2009)

Based on the Order entered today, this case is DISMISSED. Plaintiffs' conspiracy, § 1983, and failure to train, and failure to supervise claims are DISMISSED with prejudice; however, Plaintiffs' state tort law claims are DISMISSED without prejudice.

IT IS SO ORDERED this 10th day of April, 2009.

/s/ Wm. R. Wilson, Jr. _____
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 09-2090

Brant Sitzes, Individually & as Joint Administrator of Estate of Brittney Rae Sitzes, Deceased; & as Parent & Next Friend of Shelby L. Sitzes, a Minor and Nancy Sitzes, Individually, as Joint Administrator of Estate of Brittney Rae Sitzes, Deceased, & as Parent & Next Friend of Shelby L. Sitzes, a Minor.

Appellants

v.

City of West Memphis Arkansas, et al.

Appellees

Appeal from U.S. District Court for the
Eastern District of Arkansas – Jonesboro
(3:08-cv-00026-WRW)

ORDER

(Filed Jul. 15, 2010)

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge Kermit E. Bye would grant the petition for rehearing en banc.

July 15, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

BRANT SITZES, et al

PLAINTIFFS

vs. 3:08CV00026-WRW

CITY OF WEST MEMPHIS, ARKANSAS, et al

DEFENDANTS

SWORN AFFIDAVIT OF GEOFFREY P. ALPERT

I, Geoffrey P. Alpert, being first duly sworn, state that the matters contained in my expert report are true and accurate to the best of my knowledge, information, and belief.

1. On December 17, 2008 I issued a preliminary report incorporated herein as Ex. A.

2. On January 15, 2009 I issued an addendum, which is incorporated herein as Ex. B.

3. Since that date, I have personally visited the collision site and also reviewed the Affidavits of David Adams, Jo Garner and Joe Garner.

4. I would further add to the report that it is my opinion that no competent or reasonable police officer would drive with or without emergency equipment along the Rich Road residential roadway approaching an intersection in the opposing lane of traffic at the high speeds as alleged by the witnesses, accident reconstruction expert and physical evidence.

5. The driving of Officer Wright was shocking, willful, wanton, displayed a total indifference to the public and himself. It served no legitimate law enforcement purpose. Only a non-trained uncaring or malicious officer would've driven in this manner regardless of the justification for the pursuit which was low or extremely low in this instant, particularly since the alleged crime was over and Officer Wright was only to provide backup as other officers were closer and nearby. The motoring public and pedestrians were in danger by the driving of Officer Wright and reflect a conscious choice of Officer Wright with opportunity for deliberation prior to undertaking this foolish and deadly journey. If Officer Wright did NOT have on any emergency equipment as he was approaching the intersection would magnify the wantonness, but with or without emergency equipment is incomprehensible and shocking to this expert and in defiance of police procedures, policies and customs nationwide.

/s/ Geoffrey P. Alpert
GEOFFREY P. ALPERT

SUBSCRIBED & SWORN TO before me this 20 day of March, 2009.

/s/ Katie Kelley
NOTARY PUBLIC

Geoffrey P. Alpert

1905 Salem Church Rd. Irmo, South Carolina 29063
Telephone: (803) 446.4139 Fax: (803) 777-7319

PRELIMINARY REPORT

December 17, 2008

I, Geoffrey P. Alpert, declare that the following statements reflect objective truth as extracted from records provided to me by Mr. Marc Baretz or represent my expert opinion, to the highest degree of professional certainty. If called to testify in this matter, I will express the opinions contained in this report unless provided with materials that change my opinions.

1. I have a Ph.D. in Sociology from Washington State University and have been conducting research on police and law enforcement agencies for the past twenty years. I have been awarded federal, state and local grants to investigate various aspects of police work. I have been awarded several fellowships to investigate police activities and I have been asked by numerous police agencies to write policies for them, conduct training and to consult with them on various issues. I have written more than 100 publications on criminal justice, many of which deal with police policies, customs and practices. I have written articles dealing specifically with pursuit driving and the use of force and deadly force. I am familiar with police operating procedures as well as the customs developed by practice. My current position is Professor of

Criminology and Criminal Justice at the University of South Carolina and I have recently served as a member of the South Carolina Law Enforcement Training Advisory Council. I have attached a copy of my curriculum vitae.

Materials Reviewed:

Deposition of Chief Robert Paudet
Motor Vehicle Collision Report
Dispatch Log, 2-21-07
Policy and Procedure Manual
Audio Recording 911 Dispatch Calls
Videos of Scene and Media Coverage
State of Tennessee v Galtelli et al.
Deposition of Flarcell Tate
Deposition of James Wright
Statement of Robert Spencer
Statement of Whitney Ashley
Statement of David Adama
Statement of Heather Lancaster
Statement of Officer James Wright
Statement of Gerald Elliott
Statement of Judy Elliott

2. Content of Report

My report provides information about the nature and dynamics of emergency driving. In addition, I will address the customary problems created for both the police officer who is attempting to get to a particular location and the public who has expectations about how other vehicles are being driven.

Finally, I will provide an analysis of the complaint of Sitzes et al., v City of West Memphis et al.

An emergency response begins when a police officer turns on his lights and siren and goes toward a call that is a real or perceived emergency. A key element here is the use of emergency lights and siren to warn the public of an impending danger, which is the high-speed driving and other violations of the traffic laws. The goal of an emergency response is to arrive at a specific location as quickly and as safely as possible. The goal is to arrive at the specific location to provide assistance to the victim, injured party or suspect. Arriving to a scene after a crime has occurred is important but not as critical as arriving during the commission of a crime. In other words, some emergency responses are more important than others. This matrix depends on what is known about the situation, the seriousness of the crime and the number of first responders who are at the location or in close proximity. In any case, a police officer must always drive with due regard for the safety for all motorists. That is, regardless of the warning devices utilized by the officer, he or she is not permitted to drive recklessly, run through stop signs or red lights or drive too fast or dangerously for the conditions or environment.

During emergency runs, officers are most likely to undergo some physiological changes when they realize their driving is fast and creating risks. First, there may be an adrenalin "dump," and the driver may focus almost solely on the need to get to a

specific location quickly and may experience myopia and auditory lockout. Second, the officer is barraged by sounds from the siren and lights from his emergency lights which can provide a false sense of security. In any case, officer's decision-making skills will be impacted and often impaired.

Because of the potential problems created by emergency responses, certain common rules and regulations have been established to guide all emergency vehicles, including ambulances, fire trucks, and police cars. First, emergency vehicles must utilize all available equipment to warn the public, including lights and sirens. Second, emergency vehicles, while permitted to violate certain traffic laws, must drive with due regard for the motoring public. Driving with due regard for the public is defined by taking care to protect the public from unforeseen dangers. For example, some emergency vehicle policies require officers to stop or slow to a speed that allows them to stop when entering an intersection against a red light or a stop sign should a civilian vehicle not see or hear them. Some policies restrict officers from traveling 10 miles per hour over the speed limit in order to be able to respond to unforeseen circumstances. Some policies restrict officers from passing vehicles in on-coming lanes of traffic when intersections are in close proximity. Civilian drivers do not respond to emergency vehicles in a uniform manner. Although traffic laws often instruct drivers to pull to the right to allow an emergency vehicle to pass, drivers are very unpredictable when confronted with emergency vehicles.

Drivers will sometimes stop, pull to the left, or pull to the right when an emergency vehicle is behind, in front or approaching from the side. Drivers of emergency vehicles must be taught that their lights and sirens are warning devices only and do not create an invincible shield around their vehicle. These drivers must also be taught that other drivers on the roadway may not see or hear their warning devise and to drive accordingly and defensively. Therefore, it is important that drivers of emergency vehicles maintain a controllable speed that allows them to react to unpredictable drivers.

Motor Vehicle Collision Report

On February 21, 2007, at approximately 4 PM, Ms. Sitzes was driving northbound on Rich Street preparing to turn left on Arlington. At the same time, Officer James Wright was responding to a call with emergency lights and siren behind Ms. Sitzes driving northbound on Rich Street. As he was responding to his call, he crossed into the southbound or oncoming lane of traffic at a high rate of speed in great excess of the limit, and estimated by the investigating Officer Tate of at least 80 MPH to pass a vehicle and did not see Ms. Sitzes who was making a lawful left turn onto Arlington. While Ms. Sitzes had a duty to check for on-coming and cross traffic, she was not obligated to see if a vehicle was about to pass her in the oncoming lane of traffic from behind. That would be an unreasonable and reckless maneuver, even for an emergency vehicle. It would violate any standard of

driving with due regard for the safety of all motorists. Officer Wright's vehicle collided violently with the left side of Ms. Sitzes' vehicle as she turned left onto Arlington.

Conclusion

Officer James Wright was responding to a real or perceived emergency call that included a suspect posing as a security guard at Walmart. What Officer Wright heard on the radio presented a threat to the public that had either ended or was under control. His presence at the crime scene would have been helpful as back-up and a show of force. His presence at the crime scene was not essential. Even if he chose to use his emergency equipment to help clear civilian traffic so he could arrive a few moments quicker than traveling in a normal mode, he had no justification for taking life-threatening chances with his vehicle, such as passing in an on-coming lane of traffic at an intersection. Officer James Wright failed to drive with due regard for the safety of all motorists and pedestrians, he drove too fast for the conditions and he passed vehicles in a reckless fashion. His actions were a proximate cause of the crash. Other proximate causes of the crash were the lack of a clear policy and a lack of specific decision-making training for emergency driving. In fact, these deficient aspects of the West Memphis Police Department have been the practice since Chief Bob Paudert has been in office, since March 15, 1999. The police chief and other policy makers knew or should have known that the

lack of a clear policy and a lack of specific decision-making training for emergency driving would likely lead to reckless and unreasonable driving in identified emergency situations or non-emergency situations such as occurred in this crash.

/s/ Geoffrey P. Alpert
Geoffrey P. Alpert

Geoffrey P. Alpert

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ADDENDUM TO DECEMBER 17, 2008 REPORT

January 15, 2009

Sitzes v City of West Memphis

On January 14, 2009, I was asked by Mr. Baretz to clarify several issues that were introduced in my Preliminary Report of December 17, 2008. Mr. Baretz specifically asked me to clarify my opinions "concerning the deficient aspects of the training, discipline, policies or custom of the police department."

The need to train officers in emergency driving skills, including decision-making skills is obvious. The City of West Memphis has provided vehicles with emergency lights and sirens to its officers and expects them to drive and make decisions to drive in emergency situations that violate the normal rules of the road. The City expects the officers to understand the

dynamics of driving as well as possess the decision-making skills of knowing when and how to drive an emergency vehicle. The City knew or should have known the need to provide such training and had many opportunities to provide it to its officers, but chose not to provide decision-making training to its officers, thereby being deliberately indifferent to the rights of citizens. The driving of Officer Wright, including his speeds and recklessness is inconsistent with proper police behavior and practices nationwide. In this case, the failure to train officers, and specifically Officer Wright in decision-making and emergency driving, fell below the standard of police training and was a proximate cause of the injuries to Ms. Sitzes.

Although Officer Wright was discharged from his employment at the City, the lack of any mention of his reckless driving and lack of proper decision making indicates a practice in the Department that fails to address the real problems with Officer Wright. Chief Paudert's deposition testimony characterizes him as a strong proponent of police pursuits and he testified: "(Meaning) that we will not discontinue pursuits. If someone commits a crime in West Memphis and they are fleeing that we're going to pursue them" (P. 59, line 7-9). The Chief's failure to discipline Officer Wright for his driving and lack of proper decision making sets a standard for other officers to use as a baseline for what is acceptable. In other words, the Chief's emphasis on apprehension and not public safety, and his lack of discipline for Officer

Wright's deliberate driving behavior creates a flawed practice of not deterring other officers from the same reckless behavior that violates general police practices, and the rights of citizens.

/s/ Geoffrey P. Alpert
Geoffrey P. Alpert

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PRELIMINARY REPORT
December 23, 2008

Mr. Marc I. Baretz
Attorney at Law
110 Thompson Avenue
P. O. Box 1107
West Memphis, AR 72303-1107

RE: Brittney Sitzes – James Wright Collision

I have investigated the collision that occurred on February 21, 2007, at the intersection of Rich Road and Arlington Drive in West Memphis, AR. The approximate time of the collision was 3:54 p.m., according to the police report.

INFORMATION AVAILABLE

1. Police Report completed by Trooper Flarcell Tate.
2. AutoStats Vehicle data for the vehicles.
4. Photographs taken after the collision.

5. Crush stiffness coefficient data for the vehicles.
6. Scene inspection on March 27, 2007, and December 8, 2008.
7. Inspection of the Sitzes vehicle on May 18, 2007.
8. PCM and ECM data from the 2006 Crown Victoria.
9. Deposition of James Wright.
10. Deposition of Flarcell Tate.
11. Deposition of Bob Paudert.
12. At-scene photographs taken by the investigating officers.
13. Preliminary Report of Dr. Geoffrey P. Alpert.

OPINIONS AND GENERAL STATEMENTS OF FACT

1. On the afternoon of this collision, Ms. Brittney Sitzes, deceased, was driving a 2001 Oldsmobile Alera north on Rich Road, and Mr. James Wright was driving a 2006 Ford Crown Victoria north on Rich Road in West Memphis, Arkansas. Shelby Sitzes was a passenger in the Sitzes vehicle while the Wright vehicle had no passengers.
2. At the time of this collision, the weather condition was dry. The roadways are basically level and straight on both Arlington Drive and Rich Road, and the intersection is essentially a 90 degree intersection. Traffic traveling on Arlington Drive is governed by a stop sign. Arlington Drive and Rich Road are asphalt roadways. Arlington Drive is basically 27 feet wide and Rich

Road is basically 34.5 feet in width. Neither street is marked by a centerline line.

3. The collision location is a residential area that is comprised primarily of single dwelling units, and the speed limit at this location is 30 mph. In addition, this location has street signs warning motorists of children "at play."

4. Mr. Wright was traveling north in a West Memphis police car and was responding to a call at the Wal-Mart location and was allegedly operating both the blue lights and the siren on his police car as he traveled north on Rich Road and was attempting to pass one or more vehicles prior to or at the intersection of Arlington Drive and Rich Road. Ms. Sitzes was north bound at the intersection and attempting to turn left or west onto Arlington Drive.

5. The front of the Wright vehicle contacted the left side of the Sitzes vehicle at the front opening to the left-rear fender opening. Following this contact, both vehicles traveled northwest and off the roadway. The Sitzes vehicle rotated counterclockwise in its travel to final rest, and the Sitzes vehicle's right rear quarter panel and right rear corner area struck a tree and the vehicle came to rest on the west side of Rich Road. The Walker vehicle left Rich Road, traveled on the lawns on the west side of Rich Road, crossed Rich Road, and the front of the vehicle struck a tree on the east side of Rich Road and came to rest at the tree.

6. In analyzing the speed loss for the Wright vehicle, any speed that the Sitzes vehicle had at

collision is omitted. It was omitted because any speed attributed to the Sitzes and Wright vehicles would not be related to the travel north on Rich Road and would be a minor component of the various speed losses due to damage at collision or post collision travel and tree impacts.

7. In analyzing the speed of the Wright (West Memphis Police Department Vehicle), there are several components to be considered. It is important to note that the Wright vehicle was not inspected or measured; therefore, some factors in speed analysis are absent. The energy components (E1-E7) for speed analysis are listed as follows:

   E1: Damage to the left side of the Sitzes vehicle at collision.

   E2: Damage to the front of the Wright vehicle at collision.

   E3: Speed loss during rotation following the collision. During this rotation of the vehicles after collision, a secondary collision occurred causing damage to the right door of the Wright vehicle and to the left rear of the Sitzes vehicle.

   E4: Damage to the right rear of the Sitzes vehicle when the vehicle contacted the tree.

   E5: Sitzes vehicle post collision travel

      A. Travel distance on Rich Road and prior to leaving the roadway on the west side of Rich Road.

      B. Travel distance off the roadway on the west side of Rich Road prior to the

completion of the counterclockwise rotation.

C. Travel distance off the roadway on the west side of Rich Road from the completion of the counterclockwise rotation to the area of final rest.

E6: Wright vehicle post collision travel

A. Travel distance on Rich Road prior to leaving Rich Road on the west side of the street.

B. Travel distance on the west side of Rich Road.

C. Travel distance across Rich Road.

E7: Damage to the front of the Wright vehicle when the vehicle impacted the tree.

E8: Speed loss from curb contacts.

8. The speed of the Wright vehicle will be provided in three descriptions to provide a better understanding of the speed of the Wright vehicle.

A. The speed of the Wright vehicle at collision considering only post collision travel was 48 mph. This speed considers only the speed loss to account for E5 and E6 identified above. Clearly, if only post collision speed loss is considered, this speed is incomplete; however, it alone provides evidence of an unsafe speed for this area in addition to an attempted pass at an intersection.

B. The speed analysis of the Wright vehicle at collision considering only E5, E6, and E1 (the damage to the left side of the Sitzes

vehicle) indicates the speed of the Wright vehicle was 70 mph. The EBS energy to the Sitzes vehicle in this speed analysis was considered to be at -90 degrees; however, that is not totally correct. The Sitzes vehicle was at an angle and the Principle Direction of Force was not at -90 degrees; therefore, the actual EBS energy loss was greater than the amount included in this speed analysis. If a consideration for angle of collision is included, then the speed of the Wright vehicle was closer to 73 mph. Again, this speed estimate does not include the other forms of energy (or speed) dissipated and not included.

C. The Wright vehicle was not measured to determine the amount of collision damage. It is very apparent from the photographs and the scene evidence that both the Wright and the Sitzes vehicles achieved a common velocity in the damage areas at collision. Therefore, from Newton's Third Law of Motion, the forces in collision are opposite and equal. Thus, if an equal (but an opposite amount of energy) for the Wright vehicle (E2) is included during collision and the energy expended for the Wright vehicle is balanced to damage energy for the Sitzes vehicle, the speed of the Wright vehicle at collision was 86 mph. If a more conservative approach is used and the collision energy is not totally balanced, then the speed of the Wright vehicle was 79 mph.

D. It is important to remember that all of the speed estimates provided above omitted the following speed loss:

E3: Speed loss during rotation and damage to the right side of the Wright vehicle and to the left side of the Sitzes vehicle at the rear.

E4: Speed loss from the right rear of the Sitzes vehicle striking the tree.

E7: Speed loss when the Wright vehicle struck the tree.

E8: Speed loss from the curb contacts.

9. The speed indication from the Wright vehicle's Restrain Control Module (RCM) that was downloaded appears to be in stark contrast and disagreement with the information provided in Paragraph 8. The RCM indicated the Wright vehicle had a longitudinal Velocity change of 31.68, and it also shows that the Wright vehicle had a cumulative Delta Velocity of 23.20. The RCM module information provided with the download printout states that an acceleration in excess of 40 G's will cause the RCM to provide an incomplete data recording. This collision involved multiple collisions, and it exceeded 40 G's. Therefore, the data is not only incomplete but it also seriously underestimates the speed loss of the Wright vehicle during the total collision sequence.

10. When the above data provided is considered, the Wright vehicle was traveling in the range of 80 mph at collision.

11. This collision sequence began when Sitzes visually cleared the area and began her turn while the Wright Vehicle was traveling north on Rich Road at a high rate of speed. If one allows Sitzes the appropriate perception-reaction time prior to the commencement of her turn in addition to the time for her vehicle to travel from its proper location on Rich Road to the area of collision, the Wright vehicle was a considerable distance to her rear when this sequence began. At 80 mph, a vehicle is traveling at 117 feet per second. At this speed, the Wright vehicle was traveling faster than one would expect a motorist in a 30 mph speed zone to respond to an emergency vehicle.

12. The line of sight behind Sitzes was also limited since there were vehicles at various locations south of her vehicle.

13. If one were to assume the distance from the area of collision to the location where the Wright vehicle was traveling was 1.5 miles (however, it was less), at an average 40 mph the time to travel 1.5 miles is 2.24 minutes, at an average speed of 30 mph the time to travel 1.5 miles is 2.99 minutes, and time to travel 1.5 miles at an average speed of 80 mph is 1.12 minutes. Wright was driving far beyond a reasonable speed since the time gained would be unlikely to significantly affect the desired goal. In this case, the excessive speed resulted in Wright's failure to arrive at the intended location and in a violent and unnecessary collision.

14. An authorized vehicle using a siren and red and/or blue lights does not automatically have

the right-of-way. The right-of-way is requested by the emergency signals; however, the driver of an emergency vehicle must ascertain the path is clear prior to proceeding. In this situation, Wright did not ascertain the availability of a clear path prior to proceeding. He simply was traveling at an unsafe speed and at a speed that created hazard to the motoring public.

SUMMARY

This collision resulted from Wright operating a West Memphis Police Department vehicle at an unsafe speed and with disregard for the safety of other motorists in the area. If Mr. Wright had been operating his vehicle at a safe and prudent speed, this collision in all probability would not have occurred.

My opinions are based upon a reasonable degree of accident reconstruction certainty and upon generally accepted principles in the field of accident reconstruction. My opinions are supported by my professional training, education, experience, and review of the available information and material previously identified.

I am providing this preliminary report based upon the available information available. I reserve the right to amend any opinions offered in this letter if additional information becomes available.

If you need additional information, please let me know.

Thanks.

Sincerely,

/s/ J. Larry Williams
J. Larry Williams